Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

CITIZENS FOR SAFER COMMUNITIES,
Petitioner,

v.

GALE A. NORTON, in her official capacity as United States Secretary of the Interior; RONALD M. JAEGER, in his official capacity as Regional Director for the Pacific Region of the United States Department of the Interior, Bureau of Indian Affairs; THE UNITED STATES BUREAU OF INDIAN AFFAIRS; THE UNITED STATES DEPARTMENT OF THE INTERIOR; and THE UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals and the United States Secretary of the Interior correctly decided that the Secretary's acceptance of a 50-acre parcel of land in Placer County, California for the United Auburn Indian Community's establishment of a 200,000-square-foot casino, which parcel is adjacent to growing residential communities and within a short distance of residences and schools, with which the United Auburn Indian Community had no previous historical, cultural, temporal or other connection or ownership and which was remote and separate from the former Auburn Rancheria, constituted a "restoration of lands" to the United Auburn Indian Community under 25 U.S.C. § 2719(b)(1)(B)(iii) of the Indian Gaming Regulatory Act such that the Secretary of the Interior could forgo the prerequisite statutory determination that using the parcel for gaming would not be detrimental to the surrounding community.

PARTIES TO THE PROCEEDING

Plaintiffs and Appellants below included the Cities of Roseville, Rocklin and Lincoln, California in addition to Petitioner Citizens for Safer Communities. Defendants and Appellees below included Neal McCaleb, in his official capacity as United States Assistant Secretary of the Interior of Indian Affairs in addition to Respondents Gale A. Norton, in her official capacity as United States Secretary of the Interior, Ronald M. Jaeger, in his official capacity as Regional Director for the Pacific Region of the United States Department of the Interior, Bureau of Indian Affairs, The United States Bureau of Indian Affairs, The United States Department of the Interior and The United States of America.

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PETITION FOR WRIT OF CERTIORARI

Citizens for Safer Communities, a nonprofit mutual benefit corporation composed principally of residents of the Cities of Roseville, Rocklin and Lincoln, California, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINION BELOW

The opinion of the Court of Appeals ("App.", *infra* 1a) is reported at 348 F.3d 1020.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 2003. This petition was filed February 11, 2004, within 90 days of the date of the entry of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Auburn Indian Restoration Act, 25 U.S.C. § 1300*l*, *et seq.* (2003) ("AIRA"), provides in pertinent part as follows:

25 U.S.C. § 1300*l*-2. Transfer of land to be held in trust

(a) Lands to be taken in trust

The Secretary may accept any real property located in Placer County, California, for the benefit of the Tribe if conveyed or otherwise transferred to the Secretary if, at the time of such conveyance or transfer, there are no adverse legal claims on such property, including outstanding liens, mortgages, or taxes owed. The Secretary may accept any additional acreage in the Tribe's service area pursuant to the authority of the Secretary under the Act of June 18, 1934 (25 U.S.C. 461 et seq.).

(b) Former trust lands of the Auburn Rancheria

Subject to the conditions specified in this section, real property eligible for trust status under this section shall include fee land held by the White Oak Ridge Association, Indian owned fee land held communally pursuant to the distribution plan prepared and approved by the Bureau of Indian Affairs on August 13, 1959, and Indian owned fee land held by persons listed as distributees or dependent members in such distribution plan or such distributees' or dependent members' Indian heirs or successors in interest.

(c) Lands to be part of the reservation

Subject to the conditions imposed by this section, any real property conveyed or transferred under this section shall be taken in the name of the United States in trust for the Tribe or, as applicable, an individual member of the Tribe, and shall be part of the Tribe's reservation.

The Indian Gaming Regulation Act, 25 U.S.C. § 2701, *et seq.* (2003) ("IGRA"), provides in pertinent part as follows:

25 U.S.C.§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of -

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

STATEMENT OF THE CASE

1. Statement of Facts

The Auburn Indian Band is a small band of Indians (numbering fewer than 250) that formerly resided on the outskirts of Auburn, California, about 40 miles northeast of Sacramento and about the same distance from the subject land on which the Band erected a gambling casino. In 1917, the government acquired 20 acres in trust for the Band and in 1953 added 20 acres. These 40 acres became know as the Auburn Indian Rancheria. In 1958, Congress passed the Rancheria Act that terminated the Auburn Indian Rancheria and 40 others. By 1967, the Commissioner of Indian Affairs had transferred title to all the residential rancheria land to the

individual residents and had transferred title to commonly held lands to the White Oak Ridge Association, a community organization.

In 1991, individual Indians claiming to be descendants of the Auburn Band formed the United Auburn Indian Community ("UAIC"). Following an administrative denial of UAIC's request for federal tribal recognition, Congress passed the Auburn Indian Restoration Act in 1994. At that time there were approximately 170 enrolled members of UAIC, 52 of whom resided on land within the boundaries of the former rancheria. The Auburn Indian Restoration Act, in pertinent part, extended federal recognition to the UAIC, restored rights and privileges diminished or lost under the 1958 Act and allowed that the Secretary of the Interior "may accept any real property located in Placer County, California, for the benefit of the Tribe," so long as the land was free of adverse legal claims. Of the many Indian restoration acts that Congress passed, AIRA is alone in its use of "may" instead of "shall" in its grant of authority to the Secretary to accept title to lands for the benefit of the subject tribes.

In 1987, Congress passed IGRA to regulate and limit gaming on Indian land. IGRA was Congress's reaction to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that the determination of whether to conduct a commercial gaming enterprise on an Indian reservation falls within the governing tribe's recognized sovereignty, precluding state jurisdiction over Indian gaming absent an act of Congress. IGRA authorized casino gaming on Indian lands only under express conditions, including a tribal-state compact and a resolution of the tribe promising protection of public health and safety. Among other limitations was a prohibition on such gaming unless the Secretary of the Interior determined that gaming on Indian lands acquired after October 17, 1998 "would not be detrimental to the surrounding community." IGRA Section

20(b)(1)(A), 25 U.S.C. § 2719(b)(1)(A). There were exceptions to this prohibition, however, including an exception for lands "taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition," IGRA Section 20(b)(1)(B)(iii), 25 U.S.C. § 2719(b)(1)(B)(iii).

In June 1998 and October 1999, UAIC submitted applications to the Bureau of Indian Affairs ("BIA") within the Department of the Interior to have three parcels taken into trust: (i) 1,100 acres, neither within nor contiguous to the former rancheria, for residential and community purposes, (ii) three acres within the former rancheria for cultural, religious and recreational purposes and (iii) the 50 acres at issue, historically and geographically (by some 40 miles) removed from the former rancheria, for casino gaming purposes. In 2002, UAIC dropped the requests for the residential, community, cultural, religious and recreational lands and asked only for the 50 acres for the casino.

The gaming parcel is located on unincorporated land in Placer County, California. While not close to the rancheria, the parcel is bounded on three sides by the Cities of Roseville, Rocklin and Lincoln, parties to the proceedings below. The gaming parcel is less than two miles away from existing and planned residential neighborhoods within the three cities and within one-and-one-half miles of community schools. These cities are rapidly growing and densely populated. At the time of the trust application and up until the land was taken into trust, Stations Casinos, a Nevada corporation, owned the gaming parcel. Stations Casinos now manages the UAIC casino.

The cities whose residents comprise Petitioner passed unanimous resolutions opposing UAIC's application to have the parcel taken into trust for casino gaming, and they filed formal objections to the application supported by studies showing how casino gaming leads directly to greatly

increased crime and other community detriment. The studies were both actual, looking at operating casinos, and projected in the event that the UAIC casino went forward. The communities' objections could not be refuted. Even the analysis prepared by UAIC's representatives determined that the casino would lead to an additional 670 new felony arrests and more than 1,000 additional misdemeanor arrests annually. Regrettably for these communities, the fear has become reality. Reported crime, extensive roadside litter, traffic congestion and other detrimental effects have increased since the casino opened.

In reviewing UAIC's application, however, BIA and the Department of the Interior rejected—without review—both an analysis of the detrimental impact of a casino on the adjoining suburban communities under Section 20(b)(1)(A) of IGRA, 25 U.S.C. § 2719(b)(1)(A), and an analysis of the relationship, if any, of UAIC to the subject parcel. Instead, the Secretary rotely ruled that any and all of the 1,500 square miles of Placer County, regardless of the absence of temporal, historical, cultural, functional and other relationships to the rancheria and UAIC, that the Secretary accepted under the authority of 25 U.S.C. § 1300*l*-2 of AIRA constituted "the restoration of lands for an Indian tribe" and therefore were exempt both from IGRA detrimental-impact scrutiny and from any consideration of whether the lands in fact were a "restoration" as courts have applied that term. Accordingly, the Secretary accepted the 50 acres and permitted UAIC and Stations Casino to construct and to operate a 200,000-square-foot-casino within shouting distance of the homes and schools of the families comprising Petitioner and residing in the three cities.

2. Proceedings Below

On April 3, 2002, Petitioner and the cities of Roseville and Rocklin filed their complaint in the United States District Court for the District of Columbia seeking an order setting aside the United States Department of the Interior decision

accepting the 50 acres of land adjacent to the three cities' and Petitioner's suburban communities, but remote from, separate from and otherwise wholly unrelated to UAIC's former rancheria, for the massive casino. By Order dated July 8, 2002, the District Court granted UAIC's motion to intervene and consolidated Plaintiffs' motion for a preliminary injunction with the proceedings on the merits. The Court held two hearings, on August 27, 2002 and September 9, 2002, and announced its decision at the latter hearing. The Court granted Defendants' motion to dismiss in part, granted Defendants' motion for summary judgment in part and denied Plaintiffs' motion for summary judgment, thereby disposing of the complaint in its entirety. The Court followed the September 9, 2002 decision with a Memorandum Opinion and a Judgment dated September 11, 2002. App. 23a.

Plaintiffs filed timely Notices of Appeal on September 9, 2002 and September 24, 2002. On November 14, 2003, the United States Court of Appeals for the District of Columbia Circuit issued its decision affirming the decision of the District Court. App. 1a. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

Section 20 of IGRA prohibits casino gaming on lands acquired in trust by the United States after October 17, 1988 that are neither located within nor contiguous to the boundaries of existing Indian lands, unless the Secretary of the Interior determines, *inter alia*, that the casino "would not be detrimental to the surrounding community." Section 20 also contains exceptions to these requirements, including where the lands are taken into trust as part of "the restoration of lands for an Indian tribe that is restored to federal recognition."

At issue here is this "restoration of lands" exception, which the Secretary invoked and the Court of Appeals approved so that the Secretary could, as she did, ignore confronting the obvious and quite possibly disqualifying detrimental impact

of planting this casino adjacent to residential communities. The determination of whether or not a parcel of land is a "restoration of lands" exception requires a two-step analysis: (1) the tribe in question must be one that is "restored" within the meaning of this provision; and (2) the land in question must be taken into trust as part of a "restoration" of land to the restored tribe. It is thus not sufficient merely that the land in question is being taken into trust on behalf of a restored tribe. The acquisition of a particular parcel of land must itself constitute a "restoration" of that land.

The Court below declined to engage in any analysis of whether the 50 acres were, in fact, a restoration of lands. Rather, and contrary to prior District Court decisions (as the Court of Appeals noted, it was the first Circuit Court to confront the issue), the Court of Appeals held, simply, that because the land fell within the wide geographical area within which the Secretary "may" accept land for the benefit of UAIC—the entirety of Placer County, running from the Nevada border to Sacramento—the Secretary's mere acceptance of the land made the 50 acres, *ipso facto*, a "restoration" exempting the land from a consideration of the detriment to the community. Declining to concur with earlier District Court decisions, the Court of Appeals' decision reads all definitional substance out of the term "restoration," contrary to any plain meaning of the term and contrary to the intent of Congress.

1. The term "restoration," by any common definition, contains the element of giving back that which had been taken or bringing back to a position comparable to that which preexisted the taking. *See, e.g.,* Webster's New World Dictionary of American English (Simon & Schuster, Inc. 1991) ("Webster's") at 1144-45, defining "restoration" as:

> 1. a restoring or being restored; specif., a) reinstatement in a former position, rank, etc. b) restitution for loss, damage, etc. c) a putting or bringing back into a

> former, normal, or unimpaired state or condition; 2. a representation or reconstruction of the original form or structure, as of a building, fossil animal, etc.; 3. something restored.

"Restore" itself means:

> 1. to give back (something taken away, lost, etc.); make restitution of; 2. to bring back to a former or normal condition, as by repairing, rebuilding, altering etc. [to restore a building, painting, etc.].

See also Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F. Supp.2d 155, 162 (D.D.C. 2000) ("*Confederated Tribes*"); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States*, 46 F. Supp.2d 689, 696 (W.D. Mich. 1999) ("*Grand Traverse I*"). Reliance on the synonym "restitution" for a different or just for a more attenuated meaning is unavailing. Restitution means:

> 1. a giving back to the rightful owner of something that has been lost or taken away; restoration; 2. making good for loss or damage; reimbursement; 3. a return to a former condition or situation.

Webster's at 1144. Nowhere in these definitions, be they dictionary definitions or judicial considerations, is there support for the Court of Appeals' definition of "restoration" as merely any and all land in Placer County that the Secretary accepts into trust, without regard for considerations of putting or giving back, reconstruction, return to a former condition or situation or similar "restoration."

In order for there to have been a true "restoration," there must have been a consideration of, and there must have been established, some link, some nexus, between the 50 acres and UAIC's pre-termination existence, between what was lost and what was being restored. There was none of this in the decision of the Court of Appeals (or in the decision of the

Secretary). In this respect, the decision below conflicts with the plain meaning of the word "restoration."

2. The courts in *Confederated Tribes* and *Grand Traverse I* correctly recognized that inherent in the word "restoration" is the necessity of establishing some link between the replaced and the replacement. In *Confederated Tribes*, the Court referenced the necessity of linkage "to avoid the result contemplated by the defendants—that any and all property acquired by restored tribes would be eligible for gaming." 116 F. Supp.2d at 164. In *Grand Traverse I*, 46 F. Supp.2d at 701-02, the Court examined and found temporal and historical connections to the particular lands, leading the Court to conclude, in its final decision on the merits, that the subject land "was of historic, economic and cultural significance to the Band." *Grand Traverse Band of Ottawa and Chippewa Indians v. United States*, 198 F. Supp.2d 920, 936 (W.D. Mich. 2002).

The Court of Appeals' decision conflicted with both. In contrast to *Confederated Tribes*, the Court of Appeals below affirmed the very "result contemplated" that the Government sought "to avoid" in *Confederated Tribes*. The Court of Appeals also sanctioned the reverse of *Grand Traverse I*. There, the Band asserted—against the Government—that it was "not claiming that any lands which are taken into trust necessarily amount to restored lands." Instead, the Band argued that "in order to meet the requirements of the exception, the land must in some sense be said to be 'restored.'" 46 F. Supp.2d at 701. The *Grand Traverse I* Court agreed. In contrast, the Court of Appeals accepted the argument that "any lands [in Placer County] which are taken into trust necessarily amount to restored lands."

3. Absent some connection to give meaning to the term "restoration," IGRA requires that the Secretary determine that

the casino "would not be detrimental to the surrounding community" before excepting it from the general prohibition on casino gaming. Congress knew well the deleterious effects on residential communities such as the Cities of Roseville, Rocklin and Lincoln of placing casinos in their midst. That is one reason why placement near these communities is the exception, not the rule, allowed only where there is no disqualifying detrimental effect. But under the Court of Appeals' decision below, the Cities' objections on these very grounds "were . . . not legally relevant." App. 4a. As a consequence of this determination of irrelevance, the detriment that Congress expressly thought it was preventing is happening.

Furthermore, by effectively stripping "restoration" of any substantive meaning and relegating the citizens' fact-based and vital objections to legal irrelevancy, the Court of Appeals left Petitioner and the cities with no voice in one of the most critical issues affecting them and put the future of the communities and the neighborhoods into the hands of elements antithetical to the values and aspirations of tens of thousands of families.

Also neglected was any balance in what the Court of Appeals was approving. No one denies that American Indians have been severely hurt by generations of subjugation, appropriation and physical harm. But here, the case presented is of a few hundred Indians, who already have made millions of dollars and likely already have per capita wealth exceeding that of the citizens of Roseville, Rocklin and Lincoln, whose narrowly based gaming interest is trumping the widely based interests of thousands of families. Clearly, this was a case where, had the Secretary examined the factors she should have, there was room for accommodation. But the Court of Appeals rejected—in fact disallowed—any such balancing.

CONCLUSION

The Court of Appeals wrongly discarded the relationship requirement for lands to be restored lands and in so doing avoided facing, and wrongly disregarded, the undeniable and undisputed ruinous consequences on the Roseville, Rocklin, Lincoln and other adjacent communities of placing this mammoth gambling complex next door. Sadly, what the Court of Appeals' decision does is replicate in reverse the United States's devastation of Indian communities and way of life. Here, the behemoth casino will infect and indelibly degrade the adjacent residential communities and their way of life, without the Secretary's or the Court of Appeals' having given any consideration to or having shown any concern for these consequences. And, under the Court of Appeals decision, this situation can occur anywhere else in Placer County as well, in perpetuity. Congress never intended this result. For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5277

CITY OF ROSEVILLE, *et al.*,
Appellants,

v.

GALE A. NORTON, in her official capacity as
United States Secretary of Interior, *et al.*,
Appellees.

Appeal from the United States District Court
for the District of Columbia
(No. 02cv00628)

Argued September 18, 2003
Decided November 14, 2003

Before: Rogers and Roberts, *Circuit Judges*, and Silberman, *Senior Circuit Judge*.

Rogers, *Circuit Judge*

This appeal involves the intersection of two statutes concerning Indian tribes. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2003) ("IGRA"), prescribes the conditions under which Indian tribes may engage in commercial gaming on their reservations. The Auburn Indian Restoration Act, 25 U.S.C. §§ 1300*l*-1300*l*-7 (2003)

("AIRA"), restored the Auburn Indian Band located near Sacramento, California to federal recognition as an Indian Tribe and authorized the creation of a new reservation on its behalf. *See id.* §§ 1300*l*, 1300*l*-2. The cities of Roseville and Rocklin, both located near land approved by the Secretary of the Interior as part of the Tribe's new reservation, and Citizens for Safer Communities, a local nonprofit organization (hereafter "the Cities"), challenge the district court's interpretation of section 20 of IGRA. They contend that the plain language of IGRA required the Secretary, prior to deciding the land was eligible to be used for gaming, to find that gaming "would not be detrimental to the surrounding community" and to secure the consent of the Governor. *See* 25 U.S.C. § 2719(b)(1)(A). We hold, in light of IGRA's language, structure, and purpose, that the Auburn Tribe's land qualifies as the "restoration of lands" under IGRA § 20(b)(1)(B)(iii) even though the land is not located on the Tribe's former reservation as of the time the Auburn Tribe lost federal recognition and is being put to a different use than the lands on the former reservation, the Rancheria. Hence, the Secretary was not required to proceed under § 20(b)(1)(A) as the Cities contend. Accordingly, we affirm the dismissal of the Cities' IGRA cause of action and, as this is the only issue raised on appeal, we affirm the judgment of the district court.

I.

The Auburn Indian Band is a small tribe, numbering somewhere around 247 members, most of whom live near the village of Auburn in central California, not far from Sacramento. The Auburn Band currently has no reservation; in fact, the Auburn Tribe had no federally recognized existence between 1967 and 1994. The Band appears to have been formed when several surviving families of the Maidu and Meiwok Tribes, both devastated by the settlement policies of the nineteenth century, grouped into a small community that survived much of the depredation that came with the settle-

ment of California. In 1917, the federal government provided the Auburn Tribe with a small 20-acre reservation, which was expanded to 40 acres in 1953, known as the Auburn "Rancheria." As part of then-prevailing policies on Indian assimilation, however, Congress withdrew the Auburn Tribe's recognition and terminated its reservation in 1967, distributing most of the Rancheria land in fee to individual holders, pursuant to the terms of the Rancheria Act, Pub. L. No. 85-671 (1958). The policy of attempting to assimilate Indians by terminating federal trust responsibilities has since been repudiated by the President and Congress, and many tribes terminated as part of those policies have now been restored to federal recognition.

Congress restored the Auburn Band's rights as a federally recognized tribe in 1994 and authorized the Secretary of the Interior to take land into trust to serve as the Auburn Tribe's reservation. *See* AIRA, Pub. L. No. 103-434 tit. II (1994), 25 U.S.C. §§ 1300*l*-1300*l*-7 (2003). AIRA directs the Secretary to accept lands located on the Tribe's former reservation into trust, *id.* § 1300*l*-2(b), but also authorizes the Secretary to accept other unencumbered lands located elsewhere in Placer County, *id.* § 1300*l*-2(a). AIRA also references the Secretary's authority, pursuant to the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, to take additional land into trust within the tribe's "service area," which includes several neighboring counties, *id.* § 1300*l*-2(a). Under AIRA, all land taken into trust pursuant to its terms "shall be part of the Tribe's reservation." *Id.* § 1300*l*-2(c).

Rather than apply to the Secretary to re-establish their reservation on the Rancheria, most of which land was unavailable because held in fee by individual Indians or non-Indians, the Auburn Tribe applied for three separate parcels of land: one for residential and community use, one for commercial use as a gaming casino, and a third, containing a church within the boundaries of the old reservation, for

community use. The Tribe submitted a revised application in 2000, however, to request only the gaming site, reserving the other two sites for later applications. The gaming site consists of 49.21 acres located in an unincorporated portion of Placer County, California, and photographs of the area indicate that the land is flat, barren, and virtually uninhabited. The parties disagree over how far the land is from the Auburn Tribe's Rancheria, but viewing the record most favorably to the Cities, *see Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002), it is at least clear that the land is neither on nor close to the Tribe's former reservation, and is possibly as far as 40 miles away. What is clear, however, is that the land is close to the Cities.

In response to the Bureau of Indian Affairs' notice and request for comments, *see* 25 C.F.R. § 151.11 (2003), the Cities opposed the Auburn Tribe's application, arguing that the casino would increase crime in their communities and interfere with planned residential developments nearby, as well as with the family-oriented nature of the area. Moreover, they argued that because the proposed gaming was to take place on land acquired after the IGRA's effective date of October 17, 1988, the Secretary was not authorized to permit gaming on the land unless she made a threshold determination under IGRA § 20(b)(1)(A), 25 U.S.C. § 2719(b)(1)(A), that the proposed gaming activity "would not be detrimental to the surrounding communities" and obtained the concurrence of the Governor. The Bureau, relying on opinions of two Associate Solicitors of the Interior Department, took the position that the land was exempt from the threshold no-community-detriment finding normally applicable under IGRA § 20(b)(1)(A) to Indian lands acquired after 1988 because AIRA brought the Auburn Tribe's land within IGRA's exception for a "restoration of lands" to a restored tribe under § 20(b)(1)(B)(iii). The Cities' objections based on local community detriment were therefore not legally relevant, as IGRA does not require a no-community-detriment finding on

lands that are part of a "restoration of lands" before the Secretary can authorize gaming. The Cities' objections were not entirely irrelevant, however, because the Bureau considered the Tribe's land a "discretionary" acquisition, and Interior Department regulations, *see* 25 C.F.R. pt. 151, require the Secretary to consider potential land use conflicts and jurisdictional problems. *Id.* §§ 151.10(f), 151.11(a). Additionally, the Secretary must balance the need of a tribe for additional land, the use to which the land will be put, and the distance of the land from the tribe's reservation, before exercising discretion to take new land into trust for Indians. *Id.* §§ 151.10(b), (c); *id.* §§ 151.11(a), (b). The Bureau found that the balance of these factors favored the Auburn Tribe's planned use of the land for gaming. Ultimately, the Secretary, through her designees, agreed with the legal and factual determinations and approved the Tribe's application. Notice was published in the Federal Register of the Secretary's intent to take the land into trust.

The Cities filed suit against the Secretary, other Interior Department officials, and the United States under a variety of legal theories, seeking declaratory and injunctive relief, as well as a decision on the merits of their IGRA cause of action to prevent the Secretary from permitting gaming on the 49 acres to be taken into trust for the Auburn Tribe. As relevant here, the Cities alleged that the Secretary had failed to comply with the requirements of IGRA § 20(b)(1)(A). The Tribe intervened, and the Secretary moved to dismiss the IGRA cause of action based on her interpretation of the "restoration of lands" exception in IGRA § 20(b)(1)(B)(iii). Following the Secretary's agreement to delay taking the land into trust, the district court ruled that "the only reasonable interpretation" of IGRA's "restoration of lands" exception under § 20(b)(1)(B)(iii) applied to the land that the Secretary had agreed to take into trust for the Tribe. *City of Roseville v. Norton*, 219 F. Supp.2d 130, 157 (D.D.C. 2002). The court dismissed the Cities' IGRA cause of action for failure to state

a claim upon which relief can be granted, and also dismissed or entered summary judgment against the Cities on their remaining causes of action.

II.

The IGRA was enacted in 1987 to regulate gaming on Indian land. It does not treat all Indian land equally. "Class III" gaming, which encompasses most casino-style games, 25 U.S.C. § 2703(8), is generally permitted on Indian reservations, subject to certain conditions not at issue here including a valid Tribal-State compact and a validly enacted tribal ordinance, *id.* § 2710(d). Section 20 of IGRA, 25 U.S.C. § 2719, however, imposes some limits. Section 20(a) creates a prohibition: gaming is not permitted on Indian land taken into trust by the Secretary after IGRA's effective date, October 17, 1988, unless the land borders an existing reservation or is within the last recognized reservation of a tribe that was landless at the time IGRA was enacted (unless the tribe is in Oklahoma, in which case lands bordering its former reservation are exempted as well). This prohibition is subject to two exceptions in § 20(b). The first, § 20(b)(1)(A), allows the Secretary of the Interior to override § 20(a) and permit gaming on a newly acquired parcel when, "after consultation with the Indian tribe and appropriate State and local officials" the Secretary "determines that a gaming establishment . . . would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State . . . concurs. . . ." The second, § 20(b)(1)(B), exempts lands taken into trust as part of the "settlement of a land claim," "the initial reservation of an Indian tribe acknowledged by the Secretary," or the "restoration of lands for an Indian tribe that is restored to federal recognition." §§ 2719(b)(1)(B)(i), (b)(1)(B)(ii), (b)(1)(B)(iii). The IGRA does not define a "restoration of lands."

On appeal, the Cities contend that the district court erred as a matter of law in holding, contrary to the plain meaning of IGRA § 20(b)(1)(A), that the Secretary was not required to make a threshold determination that the use of the Auburn Tribe's land for gaming would not be detrimental to the surrounding communities and to obtain the Governor's concurrence. The Cities do not challenge the Secretary's authority under AIRA to take the land into trust for the Tribe. Nor do they contend on appeal that the Secretary's decision to accept the Tribe's application improperly balanced the factors set forth in the Department's regulations, 25 C.F.R. pt. 151, by failing to give adequate weight to the Cities' concerns. Thus, the Cities' appeal presents a single question of statutory interpretation. They contend that the Secretary violated IGRA because the Auburn Tribe's acquisition of the 49.21 acres cannot be a "restoration of lands" under IGRA § 20(b)(1)(B)(iii) as the Tribe never owned those acres in the past as part of its former reservation, the Rancheria, and the tract of land is too different from the Rancheria to be a "restoration" of it. IGRA § 20(b)(1)(A) therefore forbids gaming on the land absent a finding by the Secretary, concurred in by the Governor, that gaming will not have a detrimental effect on the local community—a finding the Secretary did not make pursuant to § 20(b)(1)(A). The Cities maintain that the "restoration of lands" exception can bear only one meaning, namely, that lands must be either identical or almost identical to those previously owned in order to be a "restoration," and that that reading is necessitated by the IGRA's overall policy of limiting the expansion of Indian gaming.

A.

A few preliminary comments on the nature of our review. The district court dismissed the Cities' IGRA cause of action on the merits, holding that IGRA's "restoration of lands" exception applied, and no party has challenged the district

court's decision to interpret the statute *de novo*. All parties urge this court to decide the matter as a question of law. The Secretary, while noting that her interpretation is due deference, and invoking limited deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), in the district court, does not invoke deference now as a basis for affirming the district court, and seeks affirmance of her interpretation of § 20(b)(1)(B)(iii) on the grounds relied upon by the district court.

We hold, in light of IGRA's language, structure, and purpose, that the Auburn Tribe's land qualifies as the "restoration of lands" under IGRA § 20(b)(1)(B)(iii) even though the land is not located on the Tribe's former reservation as of the time the Auburn Tribe lost federal recognition and is being put to a different use than the lands on the former reservation, the Rancheria. The Secretary, therefore, was not required to proceed under § 20(b)(1)(A) as the Cities contend. *See infra* Part II B. This holding is consistent with the Secretary's interpretation. To the extent that the Secretary's interpretation of the "restoration of lands" provision may include nuances regarding its application to Indian lands not acquired pursuant to a restoration act, the court has no occasion to reach the issue of deference to her interpretation in such circumstances. Therefore, we turn to the merits of the Cities' contentions, examining the text of the statutory exception, its context within IGRA, and IGRA's structure and purposes to determine the intent of Congress in enacting the "restoration of land" exception. *See generally Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Engine Mfrs. Ass'n v. U.S. E.P.A.*, 88 F.3d 1075 (D.C. Cir. 1996).

B.

All parties urge plain meaning constructions of the exception, albeit with different nuances. The Cities, citing Webster's Dictionary, urge the narrowest construction of the word

"restoration" as "bring[ing] back to an original state," in light of their view that IGRA is designed to restrict gambling on Indian reservations and to protect surrounding communities. The Secretary and the Tribe, also referring us to the dictionary, urge an interpretation of the word "restoration" that encompasses the concept of "restitution." The Tribe also points to this meaning of the word in ancient times as encompassing a broader concept of compensation. The Book of Exodus, for instance, at Chapter 22, Verse 1, requires that someone guilty of killing or selling another's stock must "restore five oxen for an ox, and four sheep for a sheep."

No circuit court of appeals has yet had occasion to address the scope of IGRA's "restoration of lands" exception under § 20(b)(1)(B)(iii), and district courts have assumed that lands are "restored" when included in a tribe's restoration act. When the exception has been litigated, the question has usually been whether there can be a "restoration of lands for an Indian tribe restored to federal recognition" even though the recognition of the Tribe and the land grant did not occur as a result of the same statute—implying that when they do it is the paradigm "restoration of lands." For example, in *Confederated Tribes of Coos v. Babbitt*, 116 F. Supp.2d 155, 161-65 (D.D.C. 2000), the court rejected the Secretary's interpretation, since modified, that the "restoration of lands" exception applies only to lands taken into trust pursuant to a statute restoring a tribe to federal recognition, and held that lands a tribe acquires by other means might also qualify under certain circumstances. Similar cases include *Oregon v. Norton*, 271 F. Supp.2d 1270, 1275-80 (D. Or. 2003); *Grand Traverse Band of Ottawa and Chippewa Indians v. United States*, 46 F. Supp.2d 689, 700-09 (W.D.Mich. 1999) ("*Grand Traverse I*"); and *Grand Traverse Band of Ottawa and Chippewa Indians v. United States*, 198 F. Supp.2d 920, 934-37 (W.D.Mich. 2002) ("*Grand Traverse II*"). Even assuming the instant case is not at the center of the paradigm because the AIRA does not identify these particular 49 acres

in Placer County, the term "restoration" can nonetheless readily be construed to include lands acquired pursuant to the restoration statute (AIRA) from within the restored tribe's service area designated in the AIRA. Other cases interpreting the exception have also interpreted it broadly, for instance, in *TOMAC v. Norton,* 193 F. Supp.2d 182, 192-94 (D.D.C. 2002), and *Sault Ste. Marie Tribe v. United States,* 78 F. Supp.2d 699, 705-07 (W.D.Mich. 1999), as well as in *Grand Traverse I*, 46 F. Supp.2d 695-700, and *Grand Traverse II*, 198 F. Supp.2d at 928-34, district courts have read the other term in the exception—"Indian tribe that is restored to federal recognition"—expansively, so as to include tribes whose termination or recognition is accomplished administratively rather than by an act of Congress.

Because the Auburn Tribe's land is located in Placer County, which was a designated area in the AIRA, and thus became, by operation of law, the Tribe's reservation, *see* 25 U.S.C. § 1300*l*-2(c), the court has no occasion to decide whether land obtained by a tribe other than through the tribe's restoration act is the "restoration of lands" for IGRA purposes, nor whether "restored" tribes include those whose termination or recognition has not been the result of congressional action. Instead, the court must decide the ancillary question presented by the Cities' appeal of whether lands identified in a tribe's restoration act as its reservation must meet the additional qualification of prior tribal ownership before the land can be considered a "restoration of lands for an Indian tribe that is restored to federal recognition."

All parties contend that the plain meaning of § 20(b)(1)(B)(iii) controls. The Cities point to the dictionary definition of the word "restore," and contend that the plain meaning of the term "restoration of lands" cannot encompass lands over which a tribe did not exert prior ownership, or which are dissimilar from those the tribe previously owned. Because to "restore" something means to "bring [it] back to

an original state," they maintain that the only lands that can be "restored" to the Auburn Tribe are those on its prior reservation, the Rancheria, or lands sufficiently similar in nature that they can be said to bring the reservation back to its "original" state. Other land acquired pursuant to AIRA, such as the 49 acres that the Secretary has agreed to take into trust, are simply "lands acquired by the Secretary in trust for the benefit of an Indian Tribe after October 17, 1988" for which the Auburn Tribe, like any other tribe that acquires new land, must meet the requirements of IGRA § 20(b)(1)(A) before the land can be used for commercial gaming. The Cities maintain that the narrow reading of the word "restore" is supported by IGRA's general ban on Indian gaming because if a "restoration" of lands is allowed to encompass lands to which a tribe does not demonstrate a prior connection, such as prior ownership, the exception will swallow the rule. However, the Secretary and the Tribe respond with dictionary definitions of their own, contending that "restoration" encompasses the concept of "restitution," such that it can be a "restoration" to give the Auburn Tribe lands to make restitution for past wrongs. They point out that this meaning of the word, even if less common in everyday parlance, is also included in the dictionary, fits far better with the structure of IGRA and the remedial purposes of AIRA, and is supported by AIRA's provision that all lands taken into trust pursuant to the act "shall be part of the Tribe's reservation." 25 U.S.C. § 1300*l*-2(c).

There is much to commend the interpretation of the Secretary and the Auburn Tribe regarding the scope of the "restoration of lands" exception. The IGRA plainly includes exceptions to its general prohibition of gaming on off-reservation sites, and Congress' purpose in enacting IGRA includes the promotion of tribal economic self-sufficiency, *see* 25 U.S.C. § 2702(1), a purpose with which Congress' enactment of AIRA is entirely consistent. Moreover, the syntax of the statute, which discusses not simply the restoration of the

lands themselves, but their restoration "for an Indian tribe," fits more comfortably with the concept of restitution. Even the definitions of "restore" the Cities quote in their own brief include the notion of restitution. *See* Appellants' Br. at 14, quoting Webster's II New Riverside University Dictionary p. 1002 (The Riverside Publishing Co. 1994). But, for the reasons advanced by the Cities, a narrower construction of the exception is not without a measure of plausibility. In sum, neither side can prevail by quoting the dictionary.

We turn, therefore, to context, for the court is to "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme," *Bailey v. United States*, 516 U.S. 137, 145 (1995). The force of the Cities' interpretation fades upon closer analysis, particularly in light of the general environment in which IGRA was enacted, its structure and general purpose. Even assuming that the Cities' definition of "restore" as to "bring back to an original state" is the more common meaning of the word, the statutory context makes broader readings of § 20(b)(1)(B)(iii) more plausible. That a "restoration of lands" could easily encompass new lands given to a restored tribe to re-establish its land base and compensate it for historical wrongs is evident here, where much of the Auburn Tribe's Rancheria is, as a practical matter, unavailable to it. Further, even under the Cities' definition of "restore" as to "bring back to an original state," there would appear to be no reason to limit the "original state" to 1967, rather than the earlier period before the Tribe was granted only a 40-acre reservation. Section 20(b)(1)(B)(iii) refers to the restoration of "lands," not the restoration of a "reservation." The Maidu and Meiwok Tribes from which the Auburn Tribe descended once occupied much of central California. For the Cities to now argue that the 49 acres are a windfall, as if the Tribe's ancestors had never possessed any more, is ahistorical. Given the history of Indian tribes' confinement to reservations, it is not reasonable to suppose that Congress intended "restoration" to be strictly

limited to land constituting a tribe's reservation immediately before federal recognition was terminated.

The Cities' interpretation is also difficult to reconcile with IGRA's other provisions. Limiting a "restoration of lands" to the return of lands on a tribe's prior reservation practically reads the "restoration of lands" provision out of existence. As one of the exemptions under § 20(b), the "restoration of lands" in § 20(b)(1)(B)(iii), unless it is surplusage, must exempt some land that would otherwise fall within the gaming prohibition of § 20(a). But § 20(a)(2)(B) explicitly excludes the "last recognized reservation" of a tribe that "has no reservation on October 17, 1988" from § 20(a)'s prohibition. Under the Cities' plain meaning interpretation whereby the only lands that can be part of a "restoration" are those in a tribe's former reservation, the exception would be virtually bereft of meaning because gaming on such lands is not prohibited in the first place. If the Auburn Tribe had reacquired some of the land on its former reservation, the Rancheria, it would have no need to look to the "restoration of lands" exception in § 20(b)(1)(B)(iii) in order to use the land for commercial gaming because § 20(a)(2)(B) would have excluded its Rancheria from § 20(a)'s ban on gaming. While a few scenarios might exist where § 20(b)(1)(B)(iii) would remain applicable under the Cities' interpretation (such as in the case of tribes who held other reservations prior to their "last recognized reservation"), the scope of the exemption would be substantially diminished in a manner that would appear inconsistent with Congress' general goal under IGRA of "promoting tribal economic development" and "self-sufficiency," *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365, 366-67 (D.C. Cir. 2000). It is generally presumed that Congress does not intend to enact surplusage, *see Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 698 (1995). The difficulty of reassembling a former reservation as a result of the passage of substantial periods of time between the loss of federal recog-

nition and its restoration is illustrated by the experience of the Auburn Tribe: its Rancheria is largely held in fee by individuals and unavailable as a practical matter more than a quarter of a century later. To be given meaningful effect, then, a "restoration of lands" would seem to encompass more than only the return of a tribe's former reservation.

To the extent that the Cities contend, as a fallback position, that, at the very least, land cannot be considered brought "back to its original state" unless it is at least similar to the reservation it replaces, the Cities effectively concede that a broader interpretation of the term "restoration" is appropriate. While this fallback interpretation would still allow the exception in § 20(b)(1)(B)(iii) to retain some meaning independent of § 20(a)(2)(B), it concedes that lands different than those previously held by a tribe can still be part of a "restoration." Indeed, the Cities' view that the Secretary violated IGRA by failing to make a factual determination that the accepted tract of land was substantially identical to the old Rancheria depends on their view that the 49.21 acres cannot meet this standard because is too geographically distant, considerably more valuable, and to be put to commercial rather than residential use. But to the extent the Cities rely on the notion that the Auburn Tribe's new land cannot be a "restoration" because it is not being used residentially, like the old Rancheria was, their argument is nonsensical. The point of the "restoration of lands" exception is that such lands may be used for commercial gaming; it would make no sense if a tribe's use of land for gaming could defeat the land's eligibility for gaming. Moreover, these considerations undermine the Cities' plain meaning interpretation by admitting that a "restoration of lands" to a tribe can include different lands than those on its former reservation, as occurred here.

Essentially, the Cities maintain that the "restoration of lands" exception cannot be read in a manner that would allow the Auburn Tribe to put together a new reservation that an

"established" tribe would not be permitted to acquire, namely, a gaming parcel separate from its residential and community areas. This explains the Cities' reasoning that a broad reading of the exception would swallow the rule. Because the Tribe would not have been permitted to acquire the 49 acres for gaming if its federal recognition had never been terminated, its "restoration" should not allow it greater rights than it otherwise would have enjoyed as a chronologically continuous tribe. This approach is problematic for several reasons. Had the Auburn Tribe never been terminated, it would have had opportunities for development in the intervening years, including the possible acquisition of new land prior to the effective date of IGRA. A "restoration of lands" compensates the Tribe not only for what it lost by the act of termination, but also for opportunities lost in the interim.

The Cities focus therefore on the underlying prohibition in § 20(a) of gaming on "lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." They maintain that IGRA § 20 was the product of a bill passed by the House of Representatives in the prior legislative session, H.R. 1920, 99th Cong. (2d Sess. 1986), and that the legislative history and floor remarks on that bill and its Senate counterpart by several Members of Congress, *see* 132 Cong. Rec. H.2012-02 (daily ed. April 21, 1986); *id.* S.15390-02 (daily ed. Oct. 6, 1986), indicate that Congress was opposed to the expansion of Indian gaming beyond tribes' 1988 reservations. This may be true, but neither H.R. 1920 nor its Senate counterpart contained the "restoration of lands" exception, and hence that legislative history, even assuming it could be of persuasive force for what a later Congress enacted, offers little if any insight on how broad an exception Congress made to its gaming-ban policy for restored tribes. The Cities also point to *Sac and Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001), *cert. denied sub nom. Wyandotte Nation v. Sac and Fox Nation of Missouri*, 534 U.S. 1078 (2002), although their reliance is largely

misplaced. In that case, a tribe had acquired land in downtown Kansas City, Missouri, that was located more than two hundred miles from the tribe's principal reservation. The tribe sought permission to use the land for gaming under § 20(a)(1), which exempts land bordering a tribe's "reservation" from § 20(a)'s ban. The Tenth Circuit rejected the Secretary's position that a "reservation" could include land held in trust for an Indian tribe by the federal government for non-residential purposes, reasoning that such a broad reading of the word "reservation" would undermine the anti-gaming-expansion policies of § 20(a). *Id.* 1264-67. By contrast, the Auburn Tribe's 49.21 acres are part of the Tribe's reservation by operation of law, under AIRA, 25 U.S.C. § 1300*l*-2(c), regardless of whether the land falls within IGRA's "restoration of lands" exception in § 20(b)(1)(B)(iii). To the extent, however, that the Tenth Circuit interpreted "reservation" in light of § 20's general limit of gaming on lands acquired by tribes after 1988, the decision in *Sac and Fox Nation* is consistent with the Cities' view that the "restoration of lands" exception be similarly narrowly construed.

The approach of the Tenth Circuit in *Sac and Fox Nation* is not persuasive here. First, Congress rebuked the decision almost immediately, enacting legislation stating that the authority to determine whether land is a "reservation" was delegated to the Secretary as of the effective date of IGRA. *See* Pub. L. No. 107-63, § 134 (2001). Second, the Cities point to nothing to indicate that Congress contemplated that the Auburn Tribe's reservation would be composed of only one parcel of land. Had the Tribe acquired one tract of land for residential and gaming purposes, the Cities would not want the land considered a "restoration of lands" if the land was not part of the former Rancheria, even if it bordered on the Rancheria. Had the Tribe been able to reacquire the Rancheria, used it solely for gaming, and then acquired, pursuant to the land-acquisition provision in the Indian Reorganization Act, 25 U.S.C. § 465, other land in a different

county for residential use, the reacquired Rancheria would be a "restoration of lands" under the Cities' interpretation even though the resulting reservation would conflict with the no-off-reservation-gaming policy of § 20(a).

Even assuming the policy underlying IGRA § 20(a) does support a narrow reading of the "restoration of lands" exception, the IGRA exceptions in § 20(b)(2) as well as AIRA itself all embody policies counseling for a broader reading. The general purpose of IGRA is "promoting tribal economic development" and "self-sufficiency." *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d at 366-67; 25 U.S.C. § 2702(1). A reading allowing the Auburn Tribe to participate in that economic base furthers this purpose of IGRA while a reading that confines "restoration of lands" to the old reservation, the Rancheria, (most of which is now in the hands of homeowners, many non-Indian, and hence unavailable for development) would likely deny the Tribe this opportunity. The same objective is apparent in AIRA, which directs the Secretary to consult with the tribe regarding a plan for economic development. *See* 25 U.S.C. § 1300*l*-1(a). AIRA's purpose of re-establishing the Auburn Tribe as an economically viable entity would be served by considering the new reservation established under the Restoration Act a "restoration of lands" allowing it to operate a gaming facility.

Indeed, the exceptions in IGRA § 20(b)(1)(B) serve purposes of their own, ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones. The Cities' position, that reading the "restoration of lands" exception to refer only to lands identical or comparable to lands held at the time of termination prevents "new" tribes from acquiring more rights than "old" ones, would frustrate this purpose. A tribe's pre-termination reservation is, as here, not always available. Given the passage of years between termination and restoration of federal recognition of tribes, it is likely that earlier reserva-

tion land could not easily be reestablished as a reservation for a restored tribe. Indeed, the Senate Committee Report to AIRA points out that only 22 of the 40 acres in the Auburn Tribe's old reservation were in Indian hands at the time AIRA was enacted, *see* S. Rep. No. 103-340, at 6 (1994). If the "restoration of lands" exception applied only to such lands, the "equalization" purpose of the exception would mean very little in practice. While the Cities' fallback position that substantively similar lands can also be a "restoration" would do less disservice to this purpose, that reading is, for reasons discussed, not a convincing interpretation of the exception.

Furthermore, the fact that IGRA § 20(b)(1)(B)(ii) provides a parallel exception for the "initial reservation of an Indian Tribe acknowledged by the Secretary" supports the broad reading of the "restoration of lands" exception. Acknowledged tribes, which may or may not have been formally recognized by the federal government at some point in the past, are those that gain recognition by administrative, rather than Congressional, action, *see generally* 25 C.F.R. pt. 83. The parallel placement of the two exceptions in the statute, as well as the analogous situation in which restored and acknowledged tribes find themselves, imply that these exceptions should be treated similarly. Yet it would be anomalous for Congress to confine restored tribes to whatever of their pre-termination reservation is available while simultaneously allowing acknowledged tribes to conduct gaming anywhere on their initial reservation. A far more sensible reading is that the "restoration of lands" is to a restored tribe what the "initial reservation" is to an acknowledged tribe: the lands the Secretary takes into trust to re-establish the tribe's economic viability.

The Cities' concern is misplaced in maintaining that only a narrow interpretation of IGRA's "restoration of lands" exception will prevent AIRA from granting the Auburn Tribe "an unlimited, unquestionable and unreviewable right to acquire

any tract of land of any size anywhere in Placer County as 'restored' land and commence operation of a casino," Appellants' Br. at 27. To the extent that AIRA gives the Secretary discretion to accept lands into trust within a wide geographical range, it is not all that different from other statutes restoring Indian tribes to federal recognition. *See, e.g.*, Ponca Restoration Act, Pub. L. No. 101-484 § 10(c)(1) (1990); Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89 § 105(g)(2) (1987); Coquille Restoration Act, Pub. L. No. 101-42 § 5(a) (1989); Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398 § 6 (1986). When Congress has wanted to limit the geographical range in which a restored tribe's reservation can be located, it has done so by specifying a particular tract of land as the restored tribes' reservation. *See, e.g.*, Coos, Lower Umpqua, and Siuslaw Restoration Act, Pub. L. No. 98-481 § 7 (1984). Indeed, the Secretary enjoys considerable discretionary authority to acquire land for Indians under the Indian Reorganization Act, 25 U.S.C. § 465, which authorizes the Secretary "in h[er] discretion, to acquire . . . any interest in lands . . . for the purpose of providing land for Indians." The Secretary then will have considerable authority to take land in Placer county into trust, both under AIRA and the Indian Reorganization Act, regardless of whether those lands constitute a "restoration" for IGRA purposes.

The Cities contend, however, that Congress would never have intended to give the Auburn Tribe such a broad exemption from the no-community-detriment and governor's-consent requirements of § 20(b)(1)(A) as it will have if any land the Tribe acquires in Placer County is automatically a "restoration." While the language of AIRA broadly identifies the entire county as a place in which the Tribe might acquire lands eligible for gaming, the Cities' position ignores that the location and shape of the new reservation is constrained by departmental regulations. AIRA provides that the Secretary

"may" take lands in Placer County in trust. *See* 25 U.S.C. § 1300*l*-(a). Interior Department regulations require the Secretary to consider numerous factors to guide the exercise of discretion in deciding whether or not to take particular lands into trust for a tribe, including "the need of the . . . tribe for more land," "[t]he purposes for which the land will be used," "potential conflicts of land use," and "jurisdictional problems." *See* 25 C.F.R. §§ 151.10(b), (c), (f), 151.11(a). Those regulations also provide that "as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" and "greater weight" to jurisdictional concerns. *Id.* §§ 151.11(b), (d).

The Cities' real policy objection is that the 49 acres ultimately selected by the Secretary is not an appropriate site for gaming. Although they disagree with the Secretary's determination in weighing the relevant factors in 25 C.F.R. §§ 151.10-151.11, the Cities do not contend on appeal that the Secretary failed to engage in the requisite balancing or acted arbitrarily or capriciously in applying those factors.

Finally, were there any remaining doubt that Congress intended IGRA's "restoration of lands" exception to be read broadly, to encompass more than a tribe's former reservation as of the date of the termination of its federal recognition, the Cities appear to appreciate that their interpretation would not prevail. The Indian Canon of statutory construction would resolve any doubt. The Supreme Court has on numerous occasions noted that ambiguities in federal statutes are to be read liberally in favor of the Indians. *See generally County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,* 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). IGRA is designed to promote the economic viability of Indian Tribes, and AIRA focuses on ensuring the same for the Auburn Tribe. In this

context, the Indian canon requires the court to resolve any doubt in favor of the tribe.

To the extent the Cities contend the canon is inappropriately applied to laws disfavoring Indians, pointing to IGRA § 20(a), the Cities continue to overlook the role that IGRA's exceptions in § 20(b)(1)(B) play in the statutory scheme, namely to confer a benefit onto tribes that were landless when IGRA was enacted. Neither *Chickasaw Nation v. United States*, 534 U.S. 84, 93-95 (2001), where the Court found no ambiguity, nor *Sac and Fox Nation v. Norton*, 240 F.3d 1250, previously distinguished, which did not invoke the canon, can assist the Cities here. Moreover, the Cities' suggestion that the Indian canon is no longer relevant because it is predicated upon the weakness of, and special trust responsibilities of the federal government for, American Indians, conditions no longer true in an age when tribes have "increasing political clout and sophistication," Appellants' Br. at 29-30, ignores that the Supreme Court has applied the canon even when the federal government is not a party, *e.g., Blackfeet Tribe*, 471 U.S. 759. Hence, even assuming that the purpose behind the canon is more apposite to the interpretation of Indian treaties forced upon tribes then lacking legal sophistication than to third-party suits involving federal statutes, its applicability to ambiguous statutes purporting to benefit Indians is settled.

Accordingly, we hold, as the Secretary has concluded, in light of IGRA's language, structure, and purpose, that the Auburn Tribe's land qualifies as the "restoration of lands" under IGRA § 20(b)(1)(B)(iii) even though the land is not located on the Tribe's former reservation as of the time the Auburn Tribe lost federal recognition and is being put to a different use than the lands on the former reservation, the Rancheria. Hence, the Secretary did not violate IGRA by failing to make a no-detriment finding under § 20(b)(1)(A). Because the Cities lack standing to invoke 25 U.S.C. § 476(f),

which protects tribes against agency decisions that diminish the privileges and immunities available to one tribe relative to other federally recognized tribes, *see Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *American Federation of Government Employees, AFL-CIO v. Rumsfeld*, 321 F.3d 139, 142-45 (D.C. Cir. 2003), we affirm the dismissal of the Cities' IGRA cause of action and, absent other challenge, we affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 02-0628 (EGS)

CITY OF ROSEVILLE, *et al.*,
Plaintiffs,

v.

GALE A. NORTON, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs are two California municipalities, the City of Roseville and the City of Rocklin, and an association of citizens from these cities and the neighboring City of Lincoln. Plaintiffs oppose the Secretary of Interior's decision to take a 50-acre parcel of land into trust for the intervenor, the United Auburn Indian Community ("UAIC" or "Tribe"). The Tribe intends to build a 200,000 square foot gaming casino on the parcel, which is located in Placer County, California.

Plaintiffs sue the Secretary of Interior ("Secretary"), the Assistant Secretary of Interior, the Director of the Pacific Region of the Department of Interior, the Bureau of Indian Affairs ("BIA") and the United States. They raise numerous claims against the defendants, many of which suggest that the Secretary's decision to take land into trust for the UAIC unconstitutionally infringes on the sovereignty of the State of California. Yet, in essence, this case arises from the complicated process of restoring sovereignty to the Auburn Indians. In recent years, Congress has restored numerous Indian Tribes to federal recognition and, in doing so, has provided for the restoration of lands to these tribes. Thus, the

difficult question posed by this case is not one focused on the limits of state sovereignty, but one stemming from the task of defining the scope of this Congressionally mandated restoration of lands to the Auburn Indians.

Pending before the Court are motions to dismiss or, in the alternative, for summary judgment filed by the United States and the Tribe, and plaintiffs' cross motion for summary judgment. Plaintiffs filed a motion for preliminary injunctive relief. However, pursuant to Fed. R. Civ. P. 65(a)(2), and with the consent of the parties, the Court combined consideration of the motion for preliminary injunctive relief with proceedings on the merits.

The Court grants defendants' and intervenor's motions to dismiss all of plaintiffs' claims, with the exception of that claim arising under the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 *et seq.* ("NEPA"). The Court considers plaintiffs' NEPA claim pursuant to Fed. R. Civ. P. 56 and enters summary judgment for the United States and the Tribe, and against plaintiffs, on this claim.

I. BACKGROUND

A. The Auburn Indians

In the early 1900s, the United States government acknowledged the existence of a small Indian village located on the outskirts of the City of Auburn, California. The Auburn Band of Indians, at that point, constituted a small community of California Indians who survived the depredations of the 19th century. *See* S. Rep. No. 103-340 (1994). The Band resided outside the City of Auburn, about forty miles northeast of Sacramento. *Id.* The Band's members were drawn from Indian Tribes whose aboriginal territories reached both north and south of Auburn. *Id.*

In 1917, the United States took approximately twenty acres of land into trust for the Auburn Band, and, in 1953, it took another twenty acres in trust for the Tribe. These forty acres became known as the Auburn Indian Rancheria. *Id.*

In the 1950s and 1960s, federal trust responsibilities for 41 "rancherias" were terminated. *Id.* The Auburn Rancheria was terminated on August 11, 1967, pursuant to the terms of the Rancheria Act of 1958. *Id.* The Rancheria's assets were distributed among its residents and its lands allotted to them. *Id.*

In July 1991, descendants of the Rancheria's residents formed an organization called United Auburn Indian Community of California (hereinafter "UAIC"). *Id.* After unsuccessfully applying for formal recognition with the BIA, the group was recognized by Congress pursuant to the Auburn Indian Restoration Act in 1994. *See* 25 U.S.C. § 1300*l*(a)-(b). The Act restored rights and privileges of the Tribe and its members, and extended to the UAIC and its members the status of a recognized Indian Tribe. *Id.* The Act requires the Secretary of the Interior to consult with the Tribe in order to "establish[] a plan for economic development for the Tribe." *Id.* § 1300*l*-1(a)(1). The Act also permits the Secretary to accept certain real property in trust for the benefit of the Tribe. *Id.* § 1300*l*-2.

Ninety percent of the Tribe's 247 members live within ten miles of the old Rancheria, and some fifty members still live on individual fee lands within the Rancheria's boundaries. Decl. of Jessica Tavares in Support of Tribe's Mot. to Intervene, ¶ 4. Jessica Tavares, the Chairperson of the UAIC, recounts conditions of "grinding poverty," in which many of the Tribe's members live. *Id.*; *see also* S. Rep. No. 103-240.

B. Proposal to Develop Gaming Facility

In 1997, the UAIC entered into a "collaborative process" with Placer County to locate and develop a site that would be

appropriate for Class III gaming. A.R. 1869 (letter from Placer County to the BIA) (May 16, 2000)). After considering various alternatives, the parties settled on a 49.21-acre parcel in an unincorporated portion of the County called the Sunset Industrial Area. A.R. 332 (EA). This parcel is currently vacant and is zoned as "Industrial Park-Design Corridor." *Id.* The parcel is bounded on three sides by the cities of Roseville, Rocklin and Lincoln, suburbs of Sacramento, California. The parcel is approximately forty miles away from the boundaries of the former Auburn Rancheria.

The Tribe proposed to develop a 200,000 square foot gaming and entertainment facility on the parcel. The facility would include a bingo area, a casino floor with video gaming and card tables, restaurants, bars, an entertainment lounge, and 3,500 on site parking spaces. A.R. 323. The facility is expected to draw 8,000 visitors a day and to employ approximately 1,100 people. *Id.*

In October 1999, the Tribe entered into a gaming compact with the State of California. A.R. 680-740. The compact permits the Tribe to conduct Class III gaming and requires the Tribe to contribute to the State Revenue Sharing Trust Fund, which assists "non-Compact" Indian Tribes, addresses gambling addiction, and supports state and local agencies affected by tribal gaming. *Id.*[1]

The Tribe's negotiations with Placer County culminated in a January 18, 2000, Memorandum of Understanding ("MOU"), in which the County agreed to support the Tribe's application to the Secretary of Interior. The Tribe agreed, among other things, to work within the general and

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[1] The compact was contingent on the passage of Proposition 1A, a ballot initiative which subsequently amended the state constitution to permit Class III gaming on tribal lands. Cal. Const., Art. IV, § 19 (amended Mar. 17, 2002). The Secretary approved the Tribe's compact on May 5, 2000. A.R. 679 (65 Fed. Reg. 31,189 (May 16, 2000)).

community plans, zoning ordinances and design guidelines that would have applied to a private development, to comply with the California Environmental Quality Act, to reimburse the County for use of public services, and to pay traffic mitigation and improvement fees. A.R. 820-44. A California Superior Court vacated this MOU pending compliance with environmental review procedures under the California Environmental Quality Act. A.R. 200053-63. However, the court subsequently commented that the defect was "technical," and that the MOU was likely the "best environmental alternative." *Diamond Creek Partners, Ltd. v. City of Lincoln*, No. SCV 10659, Order Denying Motion for Award of Attorneys' Fees and Costs (Cal. Super. Ct. Mar. 11, 2002).

C. Trust Application

On June 25, 1998, the Tribe filed its initial application asking the Secretary to take the parcel into trust so that it could proceed with its plans to develop a casino. The mechanism for seeking approval from the Secretary of Interior is known as a "fee-to-trust" application. Here, the Secretary seeks to take the parcel into trust pursuant to the Auburn Indian Restoration Act, 25 U.S.C. § 1300*l et seq.* However, the Secretary processed the Tribe's fee-to-trust application pursuant to procedures established under the generally applicable provisions of the Indian Restoration Act, 25 U.S.C. § 461 *et seq. See* 25 C.F.R. § 151. The Tribe amended its application on October 6, 1999, and on February 22, 2000. A.R. 778.

Beginning in 1999, the Tribe, with the assistance of Environmental Sciences Associates ("ESA"), prepared an Environmental Assessment ("EA") of the fee-to-trust application. *See* A.R. 321-561. The EA states that the BIA "worked closely with the UAIC and ESA for approximately one year in defining the Proposed Actions, the site conditions and evaluating the potential effects" of the project. A.R. 571 (EA). In addition, Mr. David Zweig of ESA attests that the

preparation of the EA took more than three years, and involved seven drafts. Intervenor's Opp'n to Mot. for Prelim. Inj., Ex. 2 ¶ 3 (Zweig decl.). He states that he worked closely with individuals from the BIA, including William Allan, the Pacific Region Environmental Protection Specialist for the BIA. *Id.* ¶ 4. The EA for the proposed casino project was released in June 2000, and 25 comments were received in response to it. The BIA published and, together with the UAIC, responded to public comments. *See* A.R. 4564-93.

The BIA adopted the EA prepared by the Tribe and, on June 21, 2000, circulated it to interested parties for comment. In response to concerns raised by various parties, including plaintiffs, the Tribe worked with Placer County to modify the project in order to mitigate the alleged human, environmental and socioeconomic impacts of the proposal. A.R. 4564-93 (Response to Comments). On January 19, 2001, the BIA issued a Finding of No Significant Impact ("FONSI"), concluding that the proposal would have no significant unmitigated environmental impacts. A.R. 310-17; *see* 40 C.F.R. § 1508.13.

On November 28, 2000, the BIA Pacific Regional Office sent notice of the land acquisition application to the State, local governments, surrounding communities, organizations, and concerned individuals seeking comments regarding the potential impact on local tax rolls, governmental services and zoning laws if the application were approved. A.R. 1268-77. After considering responses to this notice, the Regional Office concluded in February 2001 that the Tribe's voluntary contributions to surrounding communities substantially offset any loss in real property taxes generated from the property, that the other requirements of 25 C.F.R. Pt. 151 had been met, and that the Tribe's application should be granted. A.R. 259, 264; *see also* A.R. 44 (OIGM Mem. (Feb. 5, 2002)).

The Regional Office's recommendation was forwarded to the Office of Indian Gaming Management ("OIGM"), which conducted its own independent review of the proposal, the FONSI and the comments on the application. A.R. 39-50. Two of the documents considered by the OIGM were memoranda, wherein the Interior Department's Associate Solicitor for Indian Affairs concluded that the Tribe's application fell within the "restored lands" exception of Section 20 of IGRA, 25 U.S.C. § 2719(b)(1)(B)(iii). A.R. 74-76 (2002 Op.); A.R. 997-1000 (2000 Op.). OIGM concluded that, in light of the Tribe's lack of a land base, there was a clear need "to generate resources that will enable the Tribe to make its own decisions regarding the future," and that the proposed acquisition, a prerequisite to the Tribe's operation of a Class III gaming facility under IGRA, would "facilitate tribal self-determination and economic development." A.R. 42 (OIGM Mem.).

On February 5, 2002, the OIGM recommended that the Secretary take the land into trust for the Tribe. A.R. 50. The Department of Interior's regulations, 25 C.F.R. § 151.12(b), provide that the Secretary must publish notice of a decision to take land into trust in the Federal Register or in a newspaper serving the affected area, and withhold action for at least 30 days after the notice is published. On February 5, 2002, the Secretary adopted the OIGM recommendation, finding that all applicable laws and regulations had been complied with, and authorized the Regional Director to take the land into trust thirty days after the publication in the Federal Register of a Notice of the Final Agency Determination. A.R. 37-38; 25 C.F.R. § 151.12(b). The requisite notice was published in the Federal Register on March 15, 2002, and authorized the taking of land into trust for the UAIC on April 15, 2002. 67 Fed. Reg. 11,706. However, the Secretary extended that deadline until April 25, 2002, and, later, until July 9, 2002.

D. Procedural History

Plaintiffs filed this lawsuit on April 3, 2002, seeking declaratory and injunctive relief. On June 6, 2002, the UAIC filed a motion to intervene, which was granted on July 8, 2002.

The United States intended to accept title to the land on July 9, unless enjoined from doing so. The plaintiffs filed a motion for a preliminary injunction on June 20, 2002, and, on June 27, 2002, the Court ordered additional briefing on plaintiffs' motion and scheduled a hearing on the motion for July 8, 2002. The July 9, 2002 deadline was set by the United States at the request of the UAIC, which contends that it may lose rights to purchase gaming licenses from the State of California if the Tribe does not imminently begin construction of the casino.

At a July 8, 2002 hearing, the United States, with the consent of the Tribe, agreed to delay taking the land into trust until the beginning of September. This agreement permitted the Court to provide the parties with one decision on the merits, as opposed to ruling on the motion for a preliminary injunction, and later deciding the motions for summary judgment. Accordingly, pursuant to Fed. R. Civ. P. 65(a)(2), and without objection from any party, the Court consolidated plaintiffs' motion for preliminary injunctive relief with proceedings on the merits.

Prior to the July 8, 2002 hearing, both the UAIC and the United States had filed motions to dismiss or, in the alternative, for summary judgment. Following the July 8, 2002 hearing, plaintiffs filed a motion to consider their opposition to these motions as their cross motion for summary judgment. The Court granted this motion.

At the July 8, 2002 hearing, plaintiffs indicated that they had objections to the administrative record filed by the government in support of its decision to take the parcel into trust. The Court set a briefing schedule for the parties to formally lodge objections to the administrative record.

However, the parties resolved their dispute regarding the administrative record and, pursuant to an appropriate protective order, plaintiffs have been permitted to review documents previously withheld from the record. Accordingly, the Court denies as moot plaintiffs' motion to compel disclosure, which was filed on July 12, 2002, prior to the entry of the stipulated protective order on July 19, 2002.

II. STANDARD OF REVIEW

The United States and the UAIC have filed motions to dismiss or, in the alternative, for summary judgment. The Court has also granted plaintiffs' motion to treat their opposition memorandum as a cross motion for summary judgment.

The issues raised by the motions to dismiss with respect to all of plaintiffs' claims other than their NEPA claim are questions of law that may be decided without resort to an administrative record. Accordingly, the Court treats the parties' filings as cross motions for summary judgment on plaintiffs' NEPA claim only, and as motions to dismiss and an opposition memorandum to these motions for purposes of plaintiffs' remaining claims.

The Court will not grant a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Accordingly, upon consideration of a motion to dismiss for failure to state a claim, the Court accepts as true all of the complaint's factual allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229 (1984); *accord Does v. United States Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). Plaintiff is entitled to "the benefit of all inferences that can be derived from the facts

alleged." *Kowal*, 16 F.3d at 1276. However, the movant is entitled to judgment if there are no allegations in the complaint which, even if proven would provide a basis for recovery. *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (1987).

Summary judgment should be granted pursuant to Fed. R. Civ. P. 56 only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986). In ruling upon cross-motions for summary judgment, the Court shall grant summary judgment only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed. *See Rhoads v. McFerran*, 517 F.2d 66, 67 (2d Cir. 1975).

III. ANALYSIS

Plaintiffs allege that the Secretary's decision to take the 50-acre parcel into trust violates Section 20 of IGRA, NEPA and several provisions of the United States Constitution, as well as the Equal Footing Doctrine and the California Organic Act. Plaintiffs' complaint also alleges that the Auburn Indian Restoration Act is an unconstitutional delegation of Congressional power, and challenges IGRA and the Tribal-State Compact between UAIC and the State of California as unconstitutional. Plaintiffs, however, failed to defend their constitutional challenges to IGRA and the Tribal-State Compact. Accordingly, the Court treats these claims as conceded.

While the Court finds that plaintiffs' constitutional claims, with the exception of the excessive delegation claim, have little, if any, basis in law, the question of plaintiffs' standing to assert those claims presents a complex jurisdictional prerequisite to the Court's consideration of the merits of those claims. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003 (1998) (rejecting the notion that federal courts may assume jurisdiction for the purpose of deciding the merits of a case). While plaintiffs have standing

to bring their IGRA, NEPA and excessive delegation claims, the Court finds that they do not have standing to challenge the Secretary's decision to take the parcel into trust as a violation of the Enclaves Clause, the Statehood Clause, the Equal Footing Doctrine or the Tenth Amendment.

Plaintiffs' excessive delegation claim must fail because the Auburn Indian Restoration Act gives sufficient and intelligible guidance to the Secretary as to which lands may be taken into trust for the UAIC. The Court also finds that the Secretary's proposed actions do not violate Section 20 of IGRA or the requirements of NEPA.

A. Plaintiffs' Constitutional Claims

Plaintiffs bring several causes of action which, in their words, serve as "indication[s]" that the Constitution, when taken as a whole, prohibits the federal government from removing land from a state's sovereignty absent the state's consent. Tr., 8/27/02 at 49. However, these claims present novel and troublesome issues of standing. The Court is wary of reaching these standing issues where plaintiffs' underlying constitutional claims are so clearly devoid of merit. Yet, after careful consideration of binding authority, the Court has found no means of avoiding consideration of standing, a requirement that strikes at the very heart of this Court's jurisdiction to hear plaintiffs' claims.

The United States and the Tribe concede that, for purposes of a motion to dismiss, plaintiffs have alleged sufficient grounds to establish constitutional standing. However, the United States and the Tribe argue that prudential standing principles bar this Court from finding that plaintiffs have standing to raise their constitutional claims, with the exception of their claim of excessive delegation. Upon closer examination of the prudential standing doctrines implicated by plaintiffs' claims, the lines between prudential and constitutional standing concerns are not so neatly drawn. In

particular, prudential factors, which counsel against permitting plaintiffs to assert "the legal rights or interests of third parties," *Warth v. Seldin*, 422 U.S. 490, 499, are "not completely separable from Art. III's requirement that a plaintiff have a 'sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy.'" *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955 n.5, 104 S. Ct. 2839 (1984) (quoting *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S. Ct. 2868 (1976)).

Were the Court convinced that the prudential standing and constitutional standing concerns could be easily distinguished, and that plaintiffs have constitutional standing to assert their claims, the Court might be in a position to avoid the difficult standing issues presented by this case. In *Steel Company v. Citizens for a Better Environment*, the Supreme Court suggested that, while "merits questions" may not be decided before "Article III questions," "merits questions" may be decided before "statutory standing questions." 523 U.S. 83, 97 n.2, 118 S. Ct. 1003 (1998). The Court raises this distinction between questions of "statutory" standing and Article III standing in the course of distinguishing its previous decision in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 94 S. Ct. 690 (1974). There, the Court had determined whether a statutory cause of action existed before it considered whether the plaintiffs "came within the 'zone of interests' for which the cause of action was available." 523 U.S. at 97 (quoting *National Railroad Pass. Corp.*, 414 U.S. at 465 n.13). Here, the most vexatious standing concerns are raised by the prudential standing principle limiting litigants' ability to assert third-party interests. These prudential concerns are closely tied to the constitutional standing requirement of a particularized injury, and are not properly characterized as "statutory standing questions." Accordingly, the Court is bound to address plaintiffs' standing before considering the merits of their claims.

1. Standing

The United States and the Tribe challenge plaintiffs' standing to assert claims under the Enclaves Clause, the Equal Footing Doctrine, the Statehood Clause and the Tenth Amendment. The essence of these four constitutional causes of action is that the State of California's sovereignty will be impinged if the Secretary of Interior is permitted to take land into trust for the UAIC. The United States and the Tribe argue that plaintiffs, a private association and two municipalities with no claim to jurisdiction over the parcel at issue, may not assert the alleged constitutional rights of the State of California under the Enclaves and Statehood Clauses, the Tenth, or the Equal Footing Doctrine. The United States and the Tribe do not challenge plaintiffs' standing to raise their claim that the Auburn Indian Restoration Act is an unconstitutional delegation of authority. Insofar as standing is a jurisdictional prerequisite, the Court first considers plaintiffs' standing to bring their constitutional claims[2] and then evaluates the merits of plaintiffs' claims.

a. Standing Principles

This Court's jurisdiction to consider plaintiffs' claims is limited by Article III of the United States Constitution, which requires federal courts to consider only actual "cases" and "controversies." U.S. Const., Art. III. An integral piece of this "bedrock requirement," is that a litigant have standing to raise the claims, which she seeks to have adjudicated by the court. 454 U.S. at 471. "The term 'standing' subsumes a blend of constitutional requirements and prudential considerations," which the Court must address before evaluating the merits of plaintiffs' claims. *Id.* "The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting

[2] Plaintiffs' standing to raise their IGRA and NEPA claims is addressed in Sections III.B and III.C of this Memorandum Opinion.

the role of the courts, are threshold determinants of the propriety of judicial intervention." *Warth v. Seldin*, 422 U.S. 490, 517-18, 95 S. Ct. 2197 (1975).

An individual has constitutional standing if (1) she has suffered the "invasion of a legally protected interest which is . . . concrete and particularized," and actual or imminent; (2) her injury is "fairly traceable" to the challenged action of the defendant and not the result of independent action by a third party not before the court; and (3) a favorable decision would "likely" redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130 (1992).

Courts have developed prudential standing rules, which act as self-imposed limits on the jurisdiction of Article III courts. The Supreme Court has articulated a "set of prudential principles that bear on the question of standing." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474, 102 S. Ct. 752 (1982). These include: (1) the principle that "'plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties,'" *id.* (citing *Warth*, 422 U.S. at 499); (2) an avoidance of "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches," *id.* at 475 (citing *Warth*, 422 U.S. at 499-500); and (3) a requirement "that the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question,'" *id.* (citing *Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827 (1970)).

Plaintiff Citizens for Safer Communities is a non-profit mutual benefit corporation incorporated in California and organized to promote policies supporting "state and family oriented community development." Compl. ¶ 16. The majority of the organization's members reside in the Cities of

Lincoln, Rocklin and Roseville, California. *Id.* An organization has standing to sue on behalf of its members if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434 (1977).

Two plaintiffs, the City of Roseville and the City of Rocklin, are municipalities. The D.C. Circuit has rejected the argument that a city's standing is analogous to an association's standing. *See City of Olmsted Falls, Ohio v. Federal Aviation Admin.*, 292 F.3d 261, 267-68 (D.C. Cir. 2002). In *City of Olmsted Falls*, the Circuit distinguished a municipality's claim of standing from that of an organization:

> The City does not have "members" who voluntarily associated, nor are the interests it seeks to assert here germane to its *purpose*. Rather the City is effectively attempting to assert the alleged interests of its citizens under the doctrine of *parens patriae*. Arguably, this theory of standing is unavailable because a state may not sue the federal government on behalf of its citizens as *parens patriae*.

Id. at 268 (emphasis in original). However, the Circuit further observed that a city has standing when it alleges a harm to itself as a city *qua* city. *Id.* (citing *Florida Audubon Soc'y v.* Bentsen, 94 F.3d 658 (D.C. Cir. 1996); *City of Lafayette, La. v. SEC*, 481 F.2d 1101, 1103 n.3 (D.C. Cir. 1973)). Thus, a city has standing where it "allege[s] harm to its own economic interests based on the environmental impacts of [an] approved project." *Id.*; *cf. Town of Stratford, Connecticut v. Federal Aviation Admin.*, 285 F.3d 84, 89 (D.C. Cir. 2002) (finding that the Town of Stratford lacked prudential standing because it failed to show that its claimed economic injury was

connected to "any environmental effects caused by the allegedly defective environmental impact statement").

Two prudential standing doctrines are implicated by plaintiffs' claims. First, plaintiffs' allegations that the Secretary's proposed conduct is unconstitutional because it will impede on the State of California's sovereignty raise concerns that plaintiffs are not asserting their own rights under the United States Constitution, but are rather asserting the rights of the State of California. Second, defendants and intervenor suggest that plaintiffs do not fall within the "zone of interests" of the constitutional provisions that plaintiffs allege are violated by the Secretary's decision to take the parcel into trust for the UAIC. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827 (1970).

i. Third-Party Standing

Precedent of long-standing recognizes a "rule of self-restraint" barring litigants from claiming standing "to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S. Ct. 1031 (1953). A party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. This is true even where a plaintiff has alleged injury sufficient to meet the "case or controversy" requirement of Article III. *Duke Power Co. v. Caroline Environmental Study Group, Inc.*, 438 U.S. 59, 80, 98 S. Ct. 2620 (1978). That a party may indirectly benefit from asserting the rights of a third party will not suffice to confer standing. *See Warth*, 422 U.S. at 514 (finding no standing where plaintiffs were harmed indirectly by alleged violation of others' constitutional rights).

The rationale for this rule, as consistently articulated by the Supreme Court, is that courts should avoid adjudicating the rights of parties not before them, rights which the parties "may not wish to assert." *Duke Power*, 438 U.S. at 80. The

prudential rule provides courts with "the assurance that the most effective advocate of the rights at issue is present to champion them." *Id.* at 80. The rule also "'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy,' . . . and it assures the court that the issues before it will be concrete and sharply presented." *Secretary of State of Maryland*, 467 U.S. at 956 (quoting *United States v. Raines*, 362 U.S. 17, 22, 80 S. Ct. 519 (1960)).

The third party standing rule aids the Court in guaranteeing that plaintiffs meet Article III's requirement of a particularized injury. "The prudential limitations add to the constitutional minima a healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed, the claim not be an abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate." *Secretary of State of Maryland*, 467 U.S. at 955 n.5.

The Supreme Court has, however, recognized some circumstances, in which the prohibition on asserting third parties' legal interests may be relaxed or disregarded altogether. In *Powers v. Ohio*, the Supreme Court articulated "three interrelated criteria" for permitting third-party standing: "'The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.'" *Miller v. Albright*, 523 U.S. 420, 447, 118 S. Ct. 1428 (1998) (O'Connor, J., concurring) (quoting *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364 (1991)). This third criteria finds its roots in the decision of *Singleton v. Wulff*, where the Court noted that: "If there is some genuine obstacle . . . the third party's absence from court loses its tendency to

suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." 428 U.S. at 116. Thus, the Court has permitted third party standing of litigants against whom a challenged restriction was enforced, where the enforcement also resulted in a violation of a third parties' rights. *See Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987) (citing *Warth*, 422 U.S. at 510); *see also Singleton*, 428 U.S. at 113 (doctors who receive payments for their abortion services are "classically adverse" to government as payer); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 237, 90 S. Ct. 400 (1969); *Barrows v. Jackson*, 346 U.S. at 255-256 (1953).

ii. "Zone of Interest" Test

The prudential standing doctrine embodied in the "zone of interest" test was first articulated in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827 (1970). Although *Data Processing* considered only claims brought pursuant to the Administrative Procedure Act ("APA"), the decision announced a broad rule recognizing plaintiffs' standing to bring claims "arguably within the zone of interests to be protected or regulated by the statute *or constitutional guarantee* in question." *Id.* (emphasis added).

In *Data Processing*, the Court, by way of illustration, suggested that the "zone of interest" test might be satisfied by "[a] person or a family . . . [with] a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause." *Id.* at 154. However, this Court has located only one instance in which the Supreme Court has applied the "zone of interest" test to a constitutional claim. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 97 S. Ct. 599 (1977). In *Boston Stock Exchange*, the Court applied the "zone of interest" test to regional stock exchanges and their

individual members, and found that they were within the zone of interests to be protected by the Commerce Clause. *Id.* at 321 n.3.

Clarke v. Securities Industry Association suggests that the "zone of interest" test is less rigid in the APA context than in the context of other statutes or the Constitution. 479 U.S. 388, 400 n.16, 107 S. Ct. 750 (1987). In a lengthy footnote describing the scope and purpose of the "zone of interest" test, the Court commented on the role of the *Boston Stock Exchange* decision in the overall body of law interpreting the "zone of interest" test:

> The principal cases in which the "zone of interest" test has been applied are those involving claims under the APA, and the test is most usefully understood as a gloss on the meaning of § 702. While inquiries into reviewability or prudential standing in other contexts may bear some resemblance to a "zone of interest" inquiry under the APA, it is not a test of universal application. *Data Processing* speaks of claims "arguably within the zone of interests to be protected or regulated by the statute *or constitutional guarantee in question*." 397 U.S. at 153, 90 S. Ct. at 829 (emphasis added). . . . [We] have on one occasion conducted a "zone of interest" inquiry in a case brought under the Commerce Clause, *see Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320-321, n.3, 97 S. Ct. 599, 602-603, n.3, 50 L. Ed.2d 514 (1977). While the decision that there was standing in *Boston Stock Exchange* was undoubtedly correct, the invocation of the "zone of interest" test there should not be taken to mean that the standing inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the "generous review provisions" of the APA apply, *Data Processing*, 397 U.S. at 156, 90 S. Ct. at 831.

Id.

While the zone of interest test and concerns about third party standing overlap to a certain extent, each is a "distinct" "aspect of prudential standing." *American Immigration Lawyers Assoc. v. Reno*, 199 F.3d 1352, 1357 (D.C. Cir. 2000). The D.C. Circuit has distinguished the two principles of prudential standing by emphasizing the difference in the relevant inquiry required by these principles: "The zone of interest test looks at the nature of the claims asserted; third party standing focuses on who is asserting the claim and why the holder of the asserted right is not before the court." *Id.* The Circuit further recognized that, to the extent that a plaintiff is able to establish third party standing, it is likely that the third parties' interests will fall within the relevant zone of interests, and the zone of interest test will be met. *Id.*

b. Plaintiffs' Standing

Applying these constitutional and prudential standing principles to plaintiffs' claims, the Court finds that plaintiffs have sufficiently alleged Article III standing to bring their constitutional claims. However, plaintiffs lack prudential standing to bring claims under the Enclaves Clause, the Statehood Clause, the Tenth Amendment and the Equal Footing Doctrine because their claims assert interests of the State of California, not those of plaintiffs, where there is no impediment to the State's ability to protect its own interests. Plaintiffs, however, do have standing to assert their claim that the Auburn Indian Restoration Act constitutes an unconstitutional delegation of Congressional power.

"For purposes of ruling on a motion to dismiss for want of standing," the Court must "accept as true all material allegations of the complaint." *Warth*, 422 U.S. 490, 501, 95 S. Ct. 2197 (1975). In order for the Court to consider the merits of plaintiffs' claims, it need only find that one of the three plaintiffs has standing to bring the claims. *Mountain States Legal Fdt'n v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) ("For each claim, if constitutional and prudential

standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim."). The Court notes that the parties' submissions draw no distinction between the standing of Citizens for Safer Communities and that of the two plaintiff cities. However, as discussed above, the standing requirements for municipalities are distinct from, and arguably more stringent than, the prerequisites for organizational standing. Therefore, the Court begins its analysis by inquiring whether an individual member of the plaintiff organization, Citizens for Safer Communities, would have standing to bring suit. This is the first criterion of the three-prong test for organizational standing. To the extent that the Court finds that an individual member would not have standing to bring a claim, the Court need not inquire as to whether the organization meets the additional requirements for organizational standing. However, where the Court finds that the organizational plaintiff does not have standing to bring certain claims, the Court must then also consider whether the municipalities have standing to assert those claims.

i. Plaintiffs' Standing to Bring Claims under the Enclaves Clause, the Statehood Clause and the Equal Footing Doctrine

The United States and the Tribe argue that this Court should apply doctrines of prudential standing to plaintiffs' constitutional claims. Specifically, they contend that plaintiffs do not have standing to bring claims under the Enclaves Clause, Statehood Clause, and the Equal Footing Doctrine because these claims assert the rights of states *qua* states and cannot be brought by third persons. Plaintiffs respond that they have sufficiently alleged Article III standing and that prudential standing limitations should be applied sparingly and with flexibility where, as here, plaintiffs assert constitutional violations.

The Supreme Court has noted that the standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 820, 117 S. Ct. 2312 (1997). However, given the favorable standard of review on a motion to dismiss, the Court finds that members of Citizens for Safe Communities have Article III standing to bring claims under the Enclaves Clause, Statehood Clause and Equal Footing doctrine. The organization alleges that its members are injured by the Secretary's conduct because operation of a large scale casino would result in increased crime rates and in economic losses to the surrounding communities. Further, the members' proximity to the proposed casino is sufficient to show that this concrete injury is also particularized. *See Lujan*, 505 U.S. at 560. The injury is alleged to be "an invasion of a legally protected interest," *id.*, to the extent that the plaintiffs allege that the defendants' conduct is in contravention of the Enclaves Clause, Statehood Clause and Equal Footing doctrine. The members' injury is likely to be redressed by a favorable ruling on the organization's Enclaves Clause, Statehood Clause and Equal Footing doctrine claims because such a ruling would prevent the United States from taking title to the parcel in question and, consequently, prevent the UAIC from building a casino on the parcel.

While the Court finds that the members' alleged injury is both "an invasion of a legally protected interest" and "concrete and particularized," *Lujan*, 505 U.S. at 560, the crux of the standing challenge in this case is the contention that the interest invaded is not personal to plaintiff's members. To repeat the oft-quoted language of *Warth v. Seldin*, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." 422 U.S. at 499. Plaintiffs argue that this prudential doctrine should not be

applied to their claims because standing requirements are relaxed for constitutional claims. Not only is this argument patently incorrect,[3] but it ignores the degree to which third party standing concerns are intertwined with Article III standing.

This Court is unaware of any case law, and the parties have cited to no case law, discussing a litigant's standing to bring constitutional claims under the Enclaves Clause, the Statehood Clause and the Equal Footing Doctrine, let alone addressing the issue of whether prudential standing doctrines apply to such claims. However, even a cursory review of Supreme Court precedent demonstrates that the Court has consistently applied the third party standing doctrine to litigants' constitutional claims. *See, e.g., Warth*, 422 U.S. 490; *Heald v. District of Columbia*, 259 U.S. 114, 123, 42 S. Ct. 434 (1922) (plaintiff challenging a statute on constitutional grounds must demonstrate that the unconstitutional nature of the statute injures plaintiff and that the plaintiff is "within the class of persons" with respect to whom the act is unconstitutional).

The United States and the Tribe argue vehemently that plaintiffs are asserting rights on behalf of the State of California, rights which lie exclusively with the State. While the Court recognizes that the Constitution's careful balancing of state and federal interests inures to the protection of individual rights, *see New York v. United States*, 505 U.S. 144, 181, 112 S. Ct. 2408 (1992), this alone is not sufficient to suggest that all constitutional provisions concerning state sovereignty create rights in individual citizens. Nothing in the Enclaves Clause or Statehood Clause suggests the creation of rights or interests held by individuals. Indeed, the clauses, by

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[3] *See Raines v. Byrd*, 521 U.S. 811, 820, 117 S. Ct. 2312 (1997) (calling for "especially rigorous" standing analysis where constitutional challenge brought against executive or congressional branch).

their terms, recognize rights reserved to the "Legislatures of the States." U.S. Const., Art. I, § 8, cl. 17; *id.* at Art. IV, § 3, cl. 1. Similarly, the Equal Footing Doctrine guarantees to states the fundamental attributes of state sovereignty and that all states are entitled to the same level of sovereignty as is held by the original thirteen states. *Summa Corp. v. California*, 466 U.S. 198, 205, 104 S. Ct. 1751 (1984). The interests protected by these clauses, and by the Equal Footing Doctrine, are those of states *qua* states. As such, neither the organization's members, nor the municipalities, have standing to bring claims under the Enclaves Clause, Statehood Clause or Equal Footing Doctrine without some justification that would persuade this Court to set aside the general prudential rule against third party standing.

Here, the "holder" of the constitutional rights, the State of California, is able to defend its interests under the Enclaves and Statehood Clauses and under the Equal Footing Doctrine, should it choose to do so. In *American Immigration Lawyers Association*, the D.C. Circuit noted that the Supreme Court has required that some impediment must exist to the third party's ability to assert her rights or interests, before third-party standing will be permitted. 199 F.3d at 1362 (citing *Powers*, 499 U.S. at 411). Here, the State is in no way barred from bringing these claims. The State of California is not a party to this matter and, as such, the Court is not inclined to litigate the State's rights. Plaintiffs' claims present a clear example of when third party prudential concerns weigh against permitting plaintiffs to argue claims on behalf of a third party. Because the Court finds that the prudential standing principle limiting third party standing applies to plaintiffs' claims under the Enclaves Clause, Statehood Clause and Equal Footing doctrine, the Court need not reach the "zone of interest" argument advanced by defendants and intervenors.

ii. Plaintiffs' Standing to Bring a Claim Under the Tenth Amendment

In considering plaintiffs' standing to bring their Tenth Amendment claim, the Court must determine whether private individuals have cognizable rights under the Tenth Amendment. Plaintiffs maintain that the Tenth Amendment creates individual rights and, consequently, the third party standing doctrine is inapplicable to plaintiffs' Tenth Amendment claims. Indeed, if plaintiffs are right that the Tenth Amendment creates legally protected interests held by individuals, as well as by the sovereign states, no "third party" problem would exist; plaintiffs would be asserting their own interests.

The case law discussing the private plaintiffs' standing to bring claims under the Tenth Amendment is, at best, unsettled. A recent decision from this Circuit noted that whether private plaintiffs had standing was "uncertain." *Lomont v. O'Neill*, 285 F.3d 9, 13 n.3 (D.C. Cir. 2002). In *Lomont v. O'Neill*, the Circuit held that two plaintiffs, a county sheriff and a chief of a city police department, had standing to raise a commandeering claim under the Tenth Amendment. *Id.* at 13. In holding that these two plaintiffs had standing, the Circuit relied on *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365 (1997), and *Fraternal Order of Police v. United States*, 173 F.3d 898, 904-05 (D.C. Cir. 1999), where law enforcement officers were permitted to bring Tenth Amendment challenges. *Id.* at 13-14.

While *Lomont* declined to reach the issue of whether other private plaintiffs had standing to bring Tenth Amendment claims, it recognized the difficult issue of private parties' standing to proceed with such claims. *Id.* The Circuit noted that the Seventh Circuit has concluded that *New York v. United States*, 505 U.S. at 181, recognizes the existence of individual rights protected by the Tenth Amendment. *Id.* at 13 n.3 (citing *Gillespie v. City of Indianapolis*, 185 F.3d 693,

700-03 (7th Cir. 1999)). Indeed, in *New York*, the Supreme Court commented that:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

505 U.S. at 181. The Seventh Circuit found this language to be sufficient evidence that the Tenth Amendment creates legal interests in individuals. 185 F.3d at 703. However, as the D.C. Circuit further noted, in *Tennessee Electric Power Co. v. TVA*, the Supreme Court explicitly "held that the TVA had 'no standing in this suit to raise any question' under the Tenth Amendment.'" 285 F.3d at 13 n.3 (quoting *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 144 (1939)). The Circuit cautioned that the Supreme Court has been adamant that it alone has the "prerogative of overruling its own decisions," even where it may appear that a precedent's reasoning has been rejected in subsequent rulings. *Id.* (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 47, 484, 109 S. Ct. 1917 (1989)).

This Court is bound to apply Circuit precedent. *Lomont* implicitly recognizes that the Seventh Circuit's reasoning in *Gillespie* cannot be squared with *TVA*'s holding. *New York* paints a powerful picture of the "'healthy balance of power between the States and the Federal Government.'" 505 U.S. at 182 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395 (1991)). Nevertheless, *New York*'s holding in no way rests on the finding that the Tenth Amendment protects individuals. It is simply impossible to read *New York*'s description of the constitutional framework as an overruling of *TVA*. Accordingly, the Court finds that individual members of the plaintiff organization do not have standing to bring claims under the Tenth Amendment.

The plaintiff municipalities also lack standing to bring claims under the Tenth Amendment. In *TVA*, the Court held that TVA lacked standing to raise claims under the Tenth Amendment "absent the states or their officers." 306 U.S. at 144. Rights under the Tenth Amendment are thus properly raised by the states and their officers, and by them alone. Although *Printz* and similar commandeering cases suggest that an exception may exist for law enforcement personnel, the Court is not prepared to extend this exception to find that the plaintiff municipalities have standing to assert legal interests that lie with the State of California.

The Court need not consider the applicability of the "zone of interest" test to plaintiffs' Tenth Amendment claim, finding as it does that the prudential standing principle limiting third party standing bars plaintiffs from establishing standing to bring their Tenth Amendment claim.

iii. Plaintiffs' Standing to Bring Their Excessive Delegation Claim

The non-delegation doctrine stems from separation of powers concerns that prohibit Congress from delegating its legislative functions to the administrative branch of government without intelligible principles, to which the administrative officers must conform. *Loving v. United States*, 517 U.S. 748, 758-759, 116 S. Ct. 1737 (1996). The Supreme Court has held that any party injured by an agency acting pursuant to an unconstitutional delegation of authority has standing to raise the non-delegation doctrine. *See Bowsher v. Synar*, 487 U.S. 714, 721, 103 S. Ct. 2764 (1986). Indeed, in *Immigration & Naturalization Service v. Chadha*, the Supreme Court rejected the suggestion that only the affected branch of government has standing to raise a separation-of-powers challenge to a statute. 462 U.S. 919, 935-36 (1983). Thus, third party prudential concerns, which raise problems for plaintiffs' standing to bring their other constitutional

claims, are not implicated by plaintiffs' claim of excessive delegation.

Defendants and intervenor do not suggest that this claim is barred by the "zone of interests" tests and the Court cannot see that this prudential standing rule has any applicability to plaintiffs' non-delegation claim. In *National Federation of Federal Employees v. United States*, the D.C. Circuit found that a government employees union had standing to challenge the closing and realigning of domestic military bases as in violation of the non-delegation doctrine and separation of powers doctrines. 905 F.2d 400, 402 (D.C. Cir. 1990). The Circuit noted that prudential considerations might apply, but after finding that no third party standing concerns were implicated, held that the union had standing. *Id.* at 403 n.3; *see also TOMAC v. Norton*, 193 F. Supp. 2d 182 (2002) (where plaintiffs brought constitutional and administrative challenges to the United States' decision to take land into trust for an Indian tribe, court considered "zone of interest" test only in the context of plaintiffs' administrative claims).

Accordingly, the Court finds that the members of Citizens for Safer Communities have standing to bring their claim that the Auburn Indian Restoration Act constitutes an unconstitutional delegation of Congressional authority. Citizens for Safer Communities, as an organization, has standing to pursue this claim because the participation of individual members is not required for maintenance of this lawsuit, and the interests asserted are germane to the organization's purpose. *See Hunt*, 432 U.S. at 343.

c. Substantive Constitutional Claims

Plaintiffs' complaint asserts seven constitutional claims. In plaintiffs' motion for summary judgment, they defend only four of these claims. They argue that the Secretary's decision to take land into trust violates the Enclaves Clause and Statehood Clause of the United States Constitution, the

reserved powers of the State of California under the Tenth Amendment to the United States Constitution, and the Equal Footing Doctrine and the California Organic Act. Plaintiffs also claim that the Auburn Indian Restoration Act is an unconstitutional delegation of Congressional power. In addition, plaintiffs' complaint contains claims that the Secretary's decision violates the Ninth Amendment, that the IGRA is unconstitutional, and that the Tribal-State Compact between UAIC and the State of California is invalid because it violates the Equal Protection Clause of the Fourteenth Amendment. The Court treats these latter claims as conceded, as plaintiffs did not defend them in their motion for summary judgment or at oral argument. Lest doubts persist with respect to plaintiffs' standing to bring their claims under the Enclaves Clause, Statehood Clause, Equal Footing Doctrine and the Tenth Amendment, the Court addresses these claims and finds them devoid of merit. Plaintiffs' claim that the Auburn Indian Restoration Act is an unconstitutional delegation of Congressional authority must also be dismissed.

i. Enclaves Clause

Plaintiffs assert that the Secretary's acceptance into trust of the land in question violates the Enclaves Clause of the United States Constitution. U.S. Const., Art. I, § 8, cl. 17. The Enclaves Clause requires the consent of a State before the federal government may establish an enclave within a State's territory that is exclusively subject to federal legislative authority.[4] According to plaintiffs, if the United States

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[4] In full, the Enclaves Clause authorizes Congress:

> To exercise exclusive Legislation in all Cases whatsoever over such District . . . as may become the seat of the Government of the United States, and to exercise like Authority . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . . .

U.S. Const., Art. I, § 8, cl. 17.

accepts the parcel in trust on behalf of the UAIC pursuant to the Auburn Indian Restoration Act, the land is effectively removed from the sovereign jurisdiction of the State of California. *See* 25 U.S.C. § 1300*l*-2(c) (recognizing lands taken in trust for UAIC as part of the Tribe's reservation). Plaintiffs further argue that the purpose for which the land is being acquired, to construct a gaming facility, is possible only to the extent that California's anti-gambling laws will no longer apply to the parcel. Thus, plaintiffs suggest that the "resulting deprivation of state and local jurisdiction is so all-encompassing that removal of the land from such state jurisdiction to create an Indian gaming enclave" without state and local government approval would violate the Enclaves Clause. Compl. ¶ 61.

Plaintiffs' summary assertion that the Enclaves Clause stands for the proposition that "before land can be removed from the primary sovereignty of a state, the legislature of the impacted state must grant its consent to such a removal," Opp'n at 38, is simply incorrect. Plaintiffs contend that the Enclaves Clause "demonstrates that the framers intended that the territorial sovereignty of an existing state could not be *reduced* without its consent." *Id.* at 37 (emphasis added). However, in support of this statement, plaintiffs merely cite the text of the Clause, which requires state consent where Congress exercises exclusive jurisdiction over lands acquired by the United States. Congress need not exercise *exclusive* jurisdiction over lands that the United States acquires. Indeed, as plaintiffs explicitly recognize, "the mere acquisition of title by the United States is not sufficient to effectuate a general exclusion of state jurisdiction . . . ." *Id.*

To make out a viable claim for violation of the Enclaves Clause, plaintiffs must demonstrate that there will be exclusive federal jurisdiction over the parcel to be taken into trust. Plaintiffs' only authority suggesting that land taken in trust for an Indian tribe may constitute a federal enclave is a

quotation from a law review article entitled "A Revisionist History of Indian Country." The article maintains that territories for displaced tribes were located by "mak[ing] new Indian reservations enclaves of exclusive federal jurisdiction." Joseph D. Matal, *A Revisionist History of Indian Country*, 1997 Alaska L. Rev. 283, 295. At oral argument, however, plaintiffs' attorney conceded that, "under the current state of the law," land taken in trust for the Tribe is "not an absolute exclusive Federal enclave. . . ." Tr. at 45. Rather, plaintiffs' attorney suggested that, "while not creating an absolute exclusive Federal jurisdiction," the Secretary's decision to take land into trust "touches upon enclave concerns, if not the specific enclaves clause." Tr. at 46.

There is scarce case law interpreting the Enclaves Clause. However, the Supreme Court, in discussing the Enclaves Clause, has suggested that an Indian reservation represents an example of land owned by the United States that does not constitute a federal enclave. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 50 S. Ct. 455 (1930). Furthermore, in the recent Supreme Court decision of *Nevada v. Hicks*, the Supreme Court confirmed that lands held in trust are not subject to the exclusive jurisdiction of the United States. 533 U.S. 353, 121 S. Ct. 2304 (2001). In *Hicks*, the Court noted that "State sovereignty does not end at a reservation's border," and that states have "inherent jurisdiction on reservations." *Id.* at 365. The Court held that, where state interests are minimal, as with "on-reservation conduct involving only Indians . . . state law is generally inapplicable," but where "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." *Id.* at 361. Jurisdiction over Indian lands, therefore, is not exclusive, and requires "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Id.* at 362; *see also Silas Mason*, 302 U.S. at 210 (noting that the United States does

not exercise "exclusive legislative authority" over lands held in trust for Indians).

Defendants reason that exercise of jurisdiction by multiple entities over Indian lands is inconsistent with the presence of exclusive federal jurisdiction. If the parcel at issue were to be considered a federal enclave, the State would have no regulatory authority over the parcel without congressional allowance. "The cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without congressional action." *Paul v. United States*, 371 U.S. 245, 263, 58 S. Ct. 286 (1963); *see also Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1129 (10th Cir. 1979) (although reservation for the Kansas Indians was established under the Enclaves Clause, "today there is no exclusive federal jurisdictional Indian Reservation in the United States"). Yet, the holding in *Hicks* suggests that state regulation over Indian trust lands is impeded only to the extent that it conflicts with federal legislation designed to promote the welfare of Native Americans. 533 U.S. at 365; *see also United States v. McGowan*, 302 U.S. 535, 539 (1938).[5] Thus, it is 50 clear that land taken into trust for Indians does not create an exclusive federal enclave. Consequently, the Enclaves Clause is not implicated and no violation of the Clause is presented by the facts of this case.

Even if the taking of land in trust for the UAIC could somehow be construed as the creation of an exclusive federal enclave, the Enclaves Clause is not implicated where federal

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[5] Furthermore, federal law grants California significant jurisdiction over Indian country. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-08, 107 S. Ct. 1083 (1981), the Court recognized that Congress had granted six states, including California, "jurisdiction over specified areas of Indian country within the States. . . ." *Id.* (describing grant of broad criminal jurisdiction and jurisdiction over certain private civil litigation).

law preempts conflicting State jurisdiction. In the context of Enclaves Clause challenges to federal legislative authority over federally-owned state lands, the Supreme Court has distinguished between derivative and non-derivative legislative powers. *See Kleppe v. New Mexico*, 426 U.S. 529, 541-42, 96 S. Ct. 2285 (1976). Thus, in *Kleppe*, the Court found "completely beside the point" New Mexico's objection that it had not consented, pursuant to the Enclaves Clause, to legislation prohibiting the State from seizing wild animals on federally-owned public lands in the State. *Id.* at 543. The Court held that Congress had acted pursuant to its non-derivative "powers under the Property Clause." *Id.* at 542-43. The Enclaves Clause requirement of state consent is thus irrelevant where the Congressional authority to act stems from some other constitutional source. *See Nevada v. Watkins*, 914 F.2d 1545, 1554 (9th Cir. 1990).

Here, the Secretary has acted pursuant to a Congressional delegation of authority. Congress holds exclusive and plenary authority over relations with Indian tribes, which is "drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *see also Rice v. Cayetano*, 528 U.S. 495, 529 n.2, 120 S. Ct. 1044 (2000) (Stevens, J., dissenting) (collecting cases recognizing the "plenary power of Congress over the affairs of Native Americans"). Congressional authority to take land in trust for Indians and to legislate on matters affecting tribes stems from both the Indian Commerce Clause and the United States' treaty obligations. U.S. Const., Art. I, § 8, cl. 3; *Rice*, 528 U.S. at 519-20.[6]

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[6] At oral argument, plaintiffs for the first time argued that any reliance on non-derivative Congressional authority was unavailing because Congress had exceeded its authority under the Indian Commerce Clause and the Treaty Clause. Because the Court also rejects plaintiffs' excessive delegation arguments, this argument must also fail.

It is clear that the Congressional authority to take the parcel in trust for the UAIC arises from Constitutional provisions other than the Enclaves Clause. As such, pursuant to *Kleppe*, the United States' acceptance of title to the parcel does not violate the Enclaves Clause.

ii. Statehood Clause

Plaintiffs argue that the inclusion of the parcel in question into a reservation for the UAIC has the purpose and effect of removing the parcel from the State of California's sovereign jurisdiction and creates a "state or quasi-state within the borders of an existing state in violation of the Statehood Clause" of the United States Constitution. Compl. ¶ 64. Here, again, plaintiffs contend that defendants' actions would permit the UAIC to exercise complete sovereign powers over the parcel, powers that would be superior to those of the State of California. Plaintiffs aver that, by removing the gaming parcel from the sovereign jurisdiction of the state, the Secretary effectively creates a state or quasi-state.

The Statehood Clause of the Constitution provides:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more State, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of Congress.

U.S. Const., Art. IV, § 3, cl. 1. In *The Federalist No. 43*, James Madison explains that the Statehood Clause was intended to "quiet[] the jealousy" of States by assuring them that they would not be partitioned or combined in order to create new states.

Plaintiffs' claim that the Secretary's actions are tantamount to the creation of a new state in violation of the Statehood Clause is wholly unconvincing and unfounded in law. The

term "State," as used in Article IV, Section 3, contemplates a political entity that is the *equal* of other existing states. Indeed, in *Coyle v. Smith*, the Supreme Court explained that "[t]he power [in Article IV, Section 3] is to admit 'new States into *this* Union.' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." 211 U.S. 559, 567, 31 S. Ct. 688 (1911) (emphasis in original).

At oral argument, plaintiffs' counsel conceded that plaintiffs are not arguing that taking land in trust for Indian Tribes constitutes the creation of a state "per se." Tr. at 49. Plaintiffs' counsel further conceded that there is no authority for plaintiffs' argument that taking land in trust would be analogous to the creation of a state. *Id.* Rather, plaintiffs explain, they bring claims under the Statehood Clause and the Enclaves Clause as "an indication" that, when the Constitution is read as a whole, the Court should find that the federal government does not have the authority to remove land from the sovereignty of a state absent the state's consent. *Id.*

As discussed above, Supreme Court precedent clearly establishes that the creation of an Indian reservation does not negate state sovereignty. *See, e.g., Nevada v. Hicks*, 533 U.S. at 365. As such, the taking of land into trust for the UAIC in no way creates an entity equal to the State of California, or to the other states in the union. Plaintiffs' claim that the Secretary's conduct violates the Statehood Clause is therefore wholly without merit and must be dismissed.

iii. Equal Footing Doctrine and the California Organic Act

Plaintiffs allege that the defendants' "creation or recreation of a sovereign tribal entity" as a "federal protectorate" for the UAIC within the State of California violates the Equal Footing Doctrine and California's Organic Act, which guarantee

to California that it was admitted to the Union on an equal footing with the original thirteen states. Compl. ¶ 70.

The Equal Footing Doctrine derives from the Statehood Clause of the Constitution, which the Supreme Court has construed as imposing a duty "not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union." *Coyle*, 221 U.S. at 566. The doctrine "prevents the Federal Government from impairing fundamental attributes of state sovereignty when it admits new States into the Union." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203-04, 119 S. Ct. 1187 (1999). Thus, the "Federal Government . . . cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution." *Summa Corp.*, 466 U.S. at 205.

Plaintiffs have not alleged that the taking of the parcel in trust for the Tribe will in any way impair the sovereignty of the State of California such that California will no longer be equal to other states in the Union. Nor have plaintiffs alleged that California has been denied any constitutionally guaranteed right by the fact that some state laws may be preempted by federal Indian legislation. The federal government possesses plenary power with respect to Indian affairs. *Morton*, 417 U.S. at 551-52. The exercise of this plenary power simply does not constitute a violation of the equal footing doctrine.

iv. Reserved Powers of the State of California and Its Peoples under the Ninth and Tenth Amendments to the United States Constitution

Plaintiffs contend that, in the absence of express powers granting the federal government authority to set land aside for the purpose of operating a casino in contravention of state law, taking the parcel into trust would constitute a violation of the reserved powers of the State of California under the

Tenth Amendment and the powers reserved to the people, which are generally guaranteed by the Ninth Amendment.

The Tenth Amendment reserves to States all powers not granted to the federal government by the Constitution. U.S. Const. Amend. X. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156.

As previously discussed, the Supreme Court has recognized Congress' plenary power "to deal with the special problems of Indians. . . ." *Morton*, 417 U.S. at 551. This power stems "from the Constitution itself." *Id.* at 552. Indeed, the Supreme Court has held that neither the fact that an Indian Tribe has been assimilated, nor the fact that there had been a lapse in federal recognition of a tribe, was sufficient to destroy the federal power to handle Indian affairs. *United States v. John*, 437 U.S. 634, 652, 98 S. Ct. 2541 (1978). Accordingly, the Tenth Amendment does not reserve authority over Indian affairs to the States, and plaintiffs' Tenth Amendment claim is without merit and must be dismissed.

Plaintiffs failed to defend their Ninth Amendment claim in their motion for summary judgment, and it should be treated as conceded. At oral argument, plaintiffs' counsel suggested that the Ninth Amendment claim is part and parcel of plaintiffs' Tenth Amendment claim, yet appeared to concede that the Ninth Amendment claim could be dismissed to the extent that the Court found plaintiffs' Tenth Amendment claim to be without merit. *See* Tr. at 5 (". . . I don't argue [the Ninth Amendment claim] as separately cognizable, but it's part of the general limitation of powers.). In any event, this claim is also without merit. The Ninth Amendment acts as a "saving clause" for the Constitution's Bill of Rights. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579 n.15,

100 S. Ct. 2814 (1980). In essence, the Ninth Amendment was intended to protect those rights that were not expressly guaranteed in other parts of the Bill of Rights. *See DeMarco v. Cuyahoga County Dep't of Human Servs.*, 12 F. Supp. 2d 715, 723 (N.D. Ohio 1998) ("The Ninth Amendment may be invoked, if at all, to protect fundamental rights not set forth in the Constitution."). Here, plaintiffs summarily state that the taking of the parcel into trust would violate the people's Ninth Amendment rights. Yet, they fail to identify any right that has been reserved to individuals or the public, which is violated by the Secretary's decision. Accordingly, plaintiffs' Ninth Amendment claim must be dismissed.

v. Auburn Indian Restoration Act as an Unconstitutional Delegation of Congressional Power

Plaintiffs allege that the Auburn Indian Restoration Act, 25 U.S.C. § 1300*l*-1 *et seq.*, is unconstitutional because it delegates Congressional authority to decide whether to set land aside for the exercise of territorial sovereignty by the UAIC to the executive branch of the federal government without setting any applicable and meaningful standards to guide the Secretary of the Interior in her decision. Plaintiffs contend that the Act's delegation of authority to the Secretary to take lands into trust from anywhere in Placer County is unconstitutional because it "constitutes a total abdication of . . . responsibility for such determinations" by Congress. Compl. ¶ 74.

Courts must accord acts of Congress the presumption of constitutionality. *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). Congressional authority to legislate derives from Article 1, Section 1 of the U.S. Constitution, which provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const., Art. 1, § 1.

In a delegation challenge, the question presented to the court is whether the Congressional enactment has delegated legislative power to the agency and, if so, if Congress has "lay[ed] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United* States, 276 U.S. 394, 409, 48 S. Ct. 348 (1928), *quoted in Whitman v. American Trucking Ass'n*, 531 U.S. 457, 472, 121 S. Ct. 903 (2001).

In the recent Supreme Court decision of *Whitman v. American Trucking Association*, plaintiffs contended that Congress had not provided the EPA with sufficiently intelligible criteria by failing to instruct the agency "how much is too much" in determining air quality standards. *Id.* The Court, in rejecting this challenge, noted that it had frequently permitted Congress to defer the setting of specific standards to an agency. *See id.* at 474-75 (collecting cases). The Court noted that only twice in its history had it only found the requisite "intelligible principle" lacking. *Id.* at 474. In one instance, the statue conferred authority to regulate the economy on the basis of a standard of "fair competition," and in the other instance the statute provided absolutely no guidance. *Id.* (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

The power to acquire land in trust for the Indians lies with Congress, and is not an executive power. Thus, Congress is "constitutionally empowered to set the rules and regulations for" land taken in trust for Indians. *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 694 (9th Cir. 1997) (citing *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326, 62 S. Ct. 1095 (1942)).

Plaintiffs argue that the "only narrowing provision within the Auburn [Indian] Restoration Act is the geographical component," Tr. at 53, and that this alone does not provide

sufficient guidance to the Secretary. Plaintiffs rely almost exclusively on an Eighth Circuit decision, which was vacated by the Supreme Court. *See State of South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995). In *State of South Dakota*, the court held that Section 5 of the Indian Restoration Act, which permits the Secretary to acquire land in trust for Indians, was unconstitutional because it provided no legislative standards governing the Secretary's acquisition. As an initial matter, the Court notes that the *State of South Dakota* decision was vacated, albeit on other grounds, and, therefore, has no precedential value. Plaintiffs nevertheless argue that this Court should be swayed by the logic of the Eighth Circuit's opinion. Furthermore, *State of South Dakota* was decided prior to the Supreme Court's decision in *Whitman v. American Trucking Ass'n*. *See* 531 U.S. 457. Accordingly, while the Court takes note of the *South Dakota* decision, it applies the analytical principles articulated in *American Trucking*.

The Auburn Indian Restoration Act provides limitations on the Secretary's trust-acquisition authority that require that land taken into trust be within a certain geographical area, be free of any adverse legal claims, and further the objectives of the Act. *See* 25 U.S.C. §§ 1300*l*-1, 1300*l*-2(a). Furthermore, the Secretary's ability to accept acreage into trust that lies outside of Placer County, but within the Tribe's service area, is limited by the provisions of the Indian Restoration Act. *Id.* § 1300*l*-2(a).

In *Confederated Tribes of Siletz Indians of Oregon*, the Ninth Circuit rejected a claim that Section 5 of the Indian Restoration Act constituted excessive delegation. 110 F.3d at 698. Section 5 generally permits the Secretary to take land into trust for Indians in order to promote Congressional goals of Indian self-determination and economic self-sufficiency. The court found that, "[b]ecause Congress has given guidelines to the Secretary regarding when land can be taken in

trust, the primary responsibility for choosing land to be taken in trust still lies with Congress. The Secretary is not empowered to act outside of the guidelines expressed by Congress." *Id.*; *see also TOMAC v. Norton*, 193 F. Supp. 2d 182, 192 (D.D.C. 2002) (noting that "[e]ven the Eight Circuit's *South Dakota* decision recognized acquiring land for new reservations as a legitimate and specific purpose").

The existing limitations on the Secretary's trust-acquisition authority are more than sufficient to provide the requisite "intelligible principles." The Auburn Indian Restoration Act is even more specific in its directives than the broad mandate of Section 5 of the Indian Restoration Act. The Auburn Indian Restoration Act permits the Secretary to take land into trust pursuant to her authority under the Indian Restoration Act, and then further specifies the type of land and geographical location of the land that may be taken into trust. *See* 25 U.S.C. § 1300*l*-2. In addition, the Act sets forth a policy of advancing the economic development of the Tribe. *See id.* § 1300*l*-1. As such, the Court finds that Congress has provided more than sufficient guidance to the Secretary of Interior for use of her authority to take land in trust for the UAIC, and holds that the Auburn Indian Restoration Act does not constitute an unconstitutional delegation of Congressional authority.

vi. Constitutionality of IGRA

Plaintiffs' eighth cause of action alleges that IGRA is unconstitutional and that, therefore, the approval of the UAIC's trust acquisition application, made pursuant to IGRA, was arbitrary, capricious and contrary to law. Compl. ¶ 76. Plaintiffs argued that IGRA is unconstitutional because it violates the reserved powers of the several states guaranteed by the Tenth Amendment and requires a violation of state sovereign immunity in violation of the Eleventh Amendment. *Id.* However, plaintiffs failed to defend this claim in their

opposition to the motions to dismiss, and conceded the claim at oral argument. Accordingly, the Court dismisses this claim.

vii. Tribal-State Compact as Violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

Plaintiffs also fail to defend their claim that the Secretary's approval of the trust acquisition application was arbitrary, capricious and contrary to law because the compact between the UAIC and the State of California violates equal protection principles guaranteed by the Fourteen Amendment. Compl. ¶ 79 (ninth cause of action). The Court, therefore, dismisses this claim.

B. Plaintiffs' Claim that the Secretary's Decision to Take the Parcel into Trust Violates Section 20 of the Indian Gaming Regulatory Act

Plaintiffs allege that, if the Secretary is permitted to take the parcel in trust for the UAIC, it will constitute a violation of Section 20 of IGRA. Plaintiffs argue that, before the Secretary may take the parcel into trust, two prerequisites of Section 20 must be met: the Secretary must determine that construction of the proposed casino would be in the best interests of the UAIC and "would not be detrimental to the surrounding community," and the Governor of California must concur in this determination. 25 U.S.C. § 2719(b)(1)(A). The United States and the UAIC contend that these requirements do not apply to the UAIC's trust application because the land in question qualifies for an exception set forth in Section 20 for "the restoration of lands for an Indian tribe that is restored to federal recognition." *Id.* § 2719(b)(1)(A)(iii).

The viability of the parties' arguments turns on questions of statutory interpretation, requiring close consideration of both IGRA, 25 U.S.C. § 2701 *et seq.*, and the Auburn Indian

Restoration Act, 25 U.S.C. § 1300*l et seq.* The Court concludes that the only reasonable interpretation of the "restoration" exception is one that encompasses the parcel at issue in this lawsuit.

1. Statutory Scheme

IGRA "provide[s] a [federal] statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA provides a framework under which a Tribe may, under certain circumstances, conduct a "Class III" gaming operation on tribal land. *See generally Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48-49, 116 S. Ct. 1114 (1996). Under IGRA, Class III gaming includes gaming using slot machines, roulette and "banked" card games such as blackjack and poker. 25 U.S.C. § 2703(8).

IGRA requires, among other things, that a gaming operation on tribal land be conducted in conformance with a compact entered into between the Tribe and the State and approved by the Secretary of the Interior. 25 U.S.C. § 2710(d). The operation must be conducted on "Indian lands," defined to include lands "within the limits of any Indian reservation" and lands "title to which is . . . held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. §§ 2703(4), 2710(d)(1).

Section 20 of IGRA, 25 U.S.C. § 2719, generally prohibits gaming on lands acquired by the Secretary in trust for a Tribe after October 17, 1988 unless the Secretary determines that the gaming establishment "would not be detrimental to the surrounding community" and the governor of the affected state "concurs with the Secretary's determination." 25 U.S.C. § 2719(a), (b)(1). Three types of lands are, however, exempt from these requirements. Section 20(b)(1)(B) exempts:

> . . . lands . . . taken as part of . . . (i) A settlement of a land claim, (ii) The initial reservation of an Indian tribe

> acknowledged by the Secretary under the Federal acknowledgment process, or (iii) The restoration of lands for an Indian tribe that is restored to federal recognition.

25 U.S.C. § 2719(b)(1)(B). To the extent that land taken in trust falls within one of these three exceptions, the Secretary need not make a determination that a gaming establishment on the land would be in the best interests of the Indian tribe and would not be detrimental to the surrounding community.

2. Standing

Organizational plaintiff, Citizens for Safer Communities, has sufficiently alleged standing to bring a claim under IGRA. Plaintiffs allege that the Secretary based her decision to take the land in trust in part on a determination that gaming could be permitted on the land without any determination under Section 20(b)(1)(A) of IGRA, 25 U.S.C. § 2719(b)(1)(A). Plaintiffs further allege that the members of Citizens for Safer Communities live in close proximity to the proposed gaming facility, and that the facility will negatively affect their health and security. Plaintiffs further allege that this injury will be redressed by a judicial decision in their favor. *See Lujan*, 504 U.S. at 560-61. Absent the applicability of a statutory exception, the Secretary would be required to make a determination regarding the possible detriment of a gaming facility to the "surrounding community." 25 U.S.C. § 2719(b)(1)(A). Thus, plaintiffs' allegations with respect to the organization's members place the members "within the zone of interests to be protected or regulated by" IGRA. *Data Processing*, 397 U.S. at 153. Citizens for Safer Communities has standing to bring a claim under IGRA because the participation of its individual members is not necessary to the maintenance of the lawsuit, and the interests asserted are germane to the organization's purpose. *See Hunt*, 432 U.S. at 343.

3. Restoration of Lands

The Court today must determine whether the United States' intended acceptance of the parcel in trust for the Auburn Indians constitutes a "restoration of lands" for the Auburn Indians under Section 20(b)(1)(B)(iii) of IGRA.

In order to determine whether the parcel in question meets the restoration exception under Section 20(b)(1)(B)(iii), the Court must first determine whether UAIC is a "restored" tribe within the meaning of the provision. The parties do not appear to seriously dispute that the UAIC is a "restored" tribe. While plaintiffs, in their brief, suggested that UAIC was not historically a "tribe," at oral argument, they conceded that the UAIC qualifies as a "restored" tribe for purposes of Section 20. Tr. at 6. The act granting federal recognition to UAIC is entitled the "Auburn Indian Restoration Act," 25 U.S.C. 1300*l*, and expressly "restore[s]" most rights and privileges the Tribe possessed prior to the termination of recognition under the Rancheria Act (Pub. Law 85-671). *See* 25 U.S.C. 1300*l*(a), (b); *see also TOMAC v. Norton*, 193 F. Supp. 2d 182 (D.D.C. 2002) (rejecting narrow definition of "restored" tribe that would recognize only tribes losing recognition by federal action). The UAIC clearly satisfies this criterion of the restored lands exception.

The more difficult question facing the Court is whether the parcel of land, which the Secretary proposes to take in trust, is part of a "restoration of lands" to the UAIC. The Court's inquiry starts with the plain meaning of the statute. "Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." *United States v. Wiltberger*, 5 Wheat. 76, 95-96, 5 L. Ed. 37 (1820); *see also Morales v. Trans World Airlines*, 504 U.S. 374, 383, 112 S. Ct. 2031 (1992) (noting that courts should "begin with the language

employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (internal quotations omitted).

Neither "restored" nor "restoration" is defined in Section 20 or anywhere else in IGRA. *See Sault Ste. Marie*, 78 F. Supp. 2d at 706; *Grand Traverse I*, 46 F. Supp. 2d at 696. Thus, as have previous courts considering the restored land exception,[7] this Court turns to general principles of statutory construction to determine the proper meaning of the words. *See Williams v. Taylor*, 529 U.S. 420, 431-32, 120 S. Ct. 1479 (2000).

Plaintiffs argue that the plain meaning of "restored" lands encompasses only those forty acres that previously comprised the Auburn Rancheria. Tr. at 14. Barring this interpretation,

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[7] To date, only five district court opinions, three from the Western District of Michigan and two from this Court, have analyzed the restored lands exception set forth in Section 20. *See Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for Western Dist. of Mich.*, 198 F. Supp. 2d 920 (W.D. Mich. 2002) ("*Grand Traverse II*"); *TOMAC v. Norton*, 193 F. Supp. 2d 182, 193-94 (D.D.C. 2002); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt*, 116 F. Supp. 2d 155, 163-64 (D.D.C. 2000); *Sault Ste. Marie Tribe of Lake Superior v. United States*, 78 F. Supp. 2d 699, 706 (W.D. Mich. 1999), *remanded on other grounds*, 288 F.3d 910 (remanding with instructions to dismiss on grounds of plaintiffs' failure to establish standing at summary judgment stage); *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Atty. for Western Dist. of Mich.*, 46 F. Supp. 2d 689 (W.D. Mich. 1999) ("*Grand Traverse I*") (ruling on preliminary injunction). However, only *Confederated Tribes* and *Sault Ste. Marie Tribe* analyze the meaning of "restoration of lands." The *Grand Traverse* decisions and *TOMAC* primarily focus on the definition of a "restored" tribe, and not on the parameters of "restored lands." *See Grand Traverse I*, 46 F. Supp. at 698-99 (rejecting government's argument that restored land exception is limited to tribes whose recognition was restored by way of Congressional action or by order of the court, not by agency acknowledgment); *TOMAC*, 193 F. Supp. 2d at 193 (rejecting argument that a tribe was not "restored" if its federal recognition was not terminated by congressional action).

they suggest that the plain meaning of the exception must be read to refer to a similar parcel of land. Tr. at 15 (describing as a "fallback position" the idea that, if the 40 acres previously part of the Rancheria are not available, another similar 40 acres should be designated as restored lands).[8]

Such a definition of "restoration," however, would lead to an absurd result. Plaintiffs' definition would tie Indian Tribes' ability to invoke IGRA's restored land exception to the availability of the tribes' original lands. Yet, Congress, when it enacted IGRA, inevitably understood that some Indian Tribes, once restored to federal recognition, would not be able to "restore" their original tribal lands. *Cf. Confederated Tribes*, 116 F. Supp. 2d at 156 (rejecting narrow interpretation of "restored" lands to pertain only to lands mentioned in an Indian Restoration Act, and not to lands historically held by a Tribe).

The plain meaning of "restore" is clearly broader than the definitions that plaintiffs tender to this Court. In ascertaining the "plain meaning" of the term "restore," the *Grand Traverse I* court turned to the dictionary definition. The principal dictionary definitions of "restore" are:

> 1: to give back (as something lost or taken away): make restitution of: return . . . 2: to put or bring back (as into

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[8] At oral argument, plaintiffs suggested that another "plain meaning" interpretation of "restored lands" would be land "similar . . . in character in terms of its proposed use as a principal reservation." The apparent rationale underlying such a definition, if it can be described as such, is that the original 40 acres held by the Rancheria were used as a "reservation," and therefore restored lands should be so used. Plaintiffs rely on *Sac & Fox* for this argument. *See Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001). However, *Sac & Fox* interpreted a different exception to Section 20—one which exempting lands making up an acknowledged Tribe's "initial reservation." *Id.* at 1264-67. Nothing in the statute's description of restored lands suggests that it should be limited to land used as a reservation.

> existence or use) . . . . 3: to bring back or put back into a former or original state. . . .

Grand Traverse I, 46 F. Supp. 2d at 696 (quoting *Webster's Third New Int'l Dict.*, p. 1936 (G. & C. Merriam Co. 1976)). Similarly, the court considered the dictionary definition of "restoration":

> 1: an act of restoring or the condition or fact of bing restored: as a: bringing back to or putting back into a former position or condition: reinstatement, renewal, reestablishment."

Id. Thus, "restoration" connotes concepts of restitution and reestablishment.

The Supreme Court has instructed that ambiguities in statutes concerning Indians should be construed in a manner beneficial to the Indians. *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102 (1976). "The existence of a plausible construction more favorable to the [Indian tribe] must be given preference under principles of statutory construction as applied to statutes addressing Indians and the historic trust position of the United States." 46 F. Supp. at 699 (citing *Bryan*, 426 U.S. 373)). While the Court is convinced that the plain meaning of the term "restoration" encompasses the idea of restitution and reinstatement, canons governing construction of statutes concerning Indian affairs simply reinforce this interpretation. Nothing in Section 20 suggests that the "restored" land base must be identical to one previously held by the Indians and, especially where such restoration may not be feasible, the Court will not adopt so narrow a construction of the term "restoration."

The Court therefore concludes that "restoration of lands" refers to lands taken into trust that would make the UAIC whole, or place it in its "former" position. And while the Court now embarks on the task of identifying the proper scope of this "restoration," it cannot avoid noting the irony of

the current inquiry. Indian Tribes in California "underwent a catastrophic decline in population following European contact." S. Rep. 103- 340 (1994). In the 1850s, actions by the California legislature and a series of Claims Court decisions operated to deprive Indian tribes of any land claims against the Spanish and the tribes' "lands became part of the public domain." *Id.* A small band of Indians concentrated around Auburn and, in 1917, the United States government decided to recognize their existence as a band, acquiring 20 acres of land in trust for the band, which later grew to a 40-acre land base. *Id.* In 1953, the United States Congress called for the assimilation of Indians and, in 1958, terminated federal trust responsibilities for the Auburn Rancheria. *Id.* Now, the Court must ask what land would constitute "restored" lands to the descendants of the Auburn Indians, whom the United States confined to a 40-acre plot before subsequently disbanding the Rancheria.

However clear the concept of restitution might be, the actual identification of the lands that would meet this definition remains elusive. Therefore, the Court turns to the legislative history of IGRA, and to the Auburn Indian Restoration Act, in an attempt to decipher how Congress intended that the UAIC receive a "restored" land base.

Grand Traverse is helpful in interpreting the legislative intent of the "restored lands" exception. In *Grand Traverse I*, a decision that has been uniformly followed by other courts considering the "restored lands" exception, the court described the purpose of the exception as one reflecting Congressional intent to place restored tribes in a position analogous to those tribes that had not been disbanded. 46 F. Supp. 2d at 699. Under IGRA, tribes that had not been disbanded have the right to conduct gaming activities on lands which they held prior to October 17, 1988. Thus, only property acquired subsequent to this 1988 date is subject to IGRA's limitations on gaming activities. As such, Indian

tribes that were disbanded, and then restored after 1998, were at a disadvantage *vis a vis* those tribes that had not been disbanded and held land prior to 1998. By providing an exception for restored lands of restored Indian groups, Congress intended to provide some sense of parity between tribes that had been disbanded and those that had not. In order to place UAIC on an equal footing with other tribes, Congress intended to provide a land base that would be roughly equivalent to the UAIC's former land base, but which might not be identical.

In attempting to interpret the "restored lands" exception with respect to the UAIC, the Court may also look to the Auburn Indian Restoration Act for guidance. *See United Shoe Workers of America, AFL-CIO v. Bedell*, 506 F.2d 174, 179 (D.C. Cir. 1974) ("When the meaning of a word in a statute is not clear from the language of the statute itself, 'there must be recourse to all the aids available in the process of construction. . . .'"). While Congress did not explicitly incorporate the terms of the Auburn Indian Restoration Act into IGRA, IGRA refers to tribes "restored" to federal recognition, a restoration that was effected through the Act.

The Auburn Indian Restoration Act explicitly authorizes the Secretary to accept land in trust for the UAIC. Section 1300*l*-2 provides:

> (a) Lands to be taken in trust
>
> The Secretary may accept any real property located in Placer County, California for the benefit of the tribe if conveyed or otherwise transferred to the Secretary if at the time of such conveyance or transfer there are no adverse legal claims in such property, including outstanding liens, mortgages or taxes owed. The Secretary may accept additional acreage in the tribe's 77 service area pursuant to the Secretary's authority under [the Indian Reorganization Act].

> (b) Former trust lands of the Auburn Rancheria Subject to the conditions specified in this section, real property eligible for trust status under this section shall include fee land held by the White Oak Ridge Association, Indian owned fee land held communally pursuant to the distribution plan prepared and approved by the Bureau of Indian Affairs on August 13, 1959, and Indian owned fee land held by persons listed as distributees or dependent members in such distribution plan or such distributees' or dependent members' Indian Heirs or successors in interest.
>
> (c) [omitted].

25 U.S.C. § 1300*l*-2. The tribe's service area includes not only Placer County, California, but also the counties of Sacramento, Yuba, Nevada, Sutter and El Dorado. 25 U.S.C. § 1200*l*-5. The Act clearly contemplates the creation of a land base for the Tribe. However, the challenge remains of identifying the contemplated land base that should be considered restored lands.

Here, the United States and the Tribe suggest that any land mentioned in the Auburn Indian Restoration Act constitutes restored lands. They rely on an Interior Department legal opinion, which provides: "When Congress specifies or provides concrete guidance as to what lands are to be restored pursuant to the restoration act, they qualify as 'restored lands' under section 20 regardless of the dictionary definition." *See* A.R. 00998 (Interior Dep't Jan. 18, 2000, Legal Op.); *see also TOMAC*, 193 F. Supp. at 194 (finding, without discussing rationale, that lands taken into trust pursuant to a tribe's restoration act qualified for "restored lands" exception). Relying on this legal opinion, the United States and the Tribe argue that the fact that lands in Placer County are mentioned in the Auburn Indian Restoration Act is sufficient to characterize those lands as "restored."

As an initial matter, the Court rejects the contention that a legal opinion of the Interior Department is due *Chevron* deference in this Court's interpretation of Section 20. *See Chevron v. National Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778 (1984). The legal opinion is not a formal agency regulation and does not have the force of law. *See Christensen v. Harris County*, 529 U.S. 576, 586-87, 120 S. Ct. 1655 (2000). Rather, the opinion may be "entitled to respect" under the Supreme Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161 (1944), but only insofar as the opinion has the "power to persuade." *Id.*

Plaintiffs argue that subsection (b), by its terms, must be read as defining the full extent of any restored lands. Subsection (b) governs the acceptance into trust of "former trust lands of the Auburn Rancheria." 25 U.S.C. § 1300*l*-2(b). It directs the Secretary to take in trust any lands owned in fee by the White Oak Ridge Association, by "distributees," their dependents and successors in interest, or held communally.

However, the Court has determined that "restoration of lands" denotes a restitution to the Tribe of a land base. The Court looks to the Auburn Indian Restoration Act as a guide in determining what lands Congress intended should be considered as lands sufficient to restore the UAIC to its previous position. Subsection (b) can hardly be read as a provision reestablishing a land base for the UAIC.[9]

The clear intent of subsection (a) is to restore a land base to the Tribe, and the Court looks to this subsection to identify the scope of the "restoration of lands" to the UAIC. Plaintiffs argue that to rely on subsection (a) for a definition of restored

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[9] The Court need not reach the Tribe's argument that subsection (b) applies only to the Secretary's ability to hold lands in trust in the name of individual members of the Tribe, and not to her ability to accept lands in trust for the Tribe. Subsection (b), by itself, is clearly insufficient to satisfy the Congressional goal of restoring a land base to the Tribe.

lands would produce an absurd result, permitting the Secretary to take an unlimited amount of land in trust for the Tribe. In *Sault Ste. Marie Tribe*, the plaintiffs raised the same argument, suggesting that the Secretary could be required to acquire all the land in the named counties on behalf of the Indians. 78 F. Supp. at 704. The court rebuffed this argument: "Congress does not appear to be concerned with this possibility, and neither is this Court." *Id.* The court noted that there were practical limits to the Indians' ability to acquire title to property in the counties. Similarly, this Court is not concerned that the UAIC might, as plaintiffs predict, ask the United States to take into trust land located across from the State Capitol, and build a gaming casino there.

In addition, plaintiffs argue that, if all of subsection (a) is taken as a "restoration" clause, the restoration necessarily encompasses land throughout the service area of the Tribe. The Tribe, however, argues for a different interpretation of subsection (a). The Tribe suggests that the second clause of the subsection, which provides that the Secretary may take additional acreage in the Tribe's service area pursuant to the Indian Restoration Act, simply emphasizes that the section should not be read to limit the Secretary's more general authority under the Indian Restoration Act. Such a construction is both logical and persuasive.

One final argument presented by plaintiffs requires brief consideration. Plaintiffs contend that the discretionary nature of the Secretary's authority to take land in trust for the UAIC under subsection (a) weighs against a finding that land taken into trust pursuant to that section are restored lands. Plaintiffs rely in part on *Sault Ste. Marie Tribe*, where the court held that the Secretary's determination that any land accepted pursuant to a mandatory instruction that lands "shall" be taken into trust was "restored" land was reasonable. 78 F. Supp. 2d at 702. The court noted that one section of the Little Traverse Restoration Act required the Secretary to accept

property for the benefit of the Tribe, while the other provided only that the Secretary "may" accept additional acreage in the Tribe's service area. *Id.*

Plaintiffs suggest that, because subsection (a) contains discretionary language, and subsection (b) contains mandatory language, subsection (b) is properly read as defining the scope of the UAIC's restored lands. They argue that the amendment of subsection (a) in 1996, which replaced the word "shall" with "may," further supports their reading of the statute. Pub. L. 104-122 (1996). However, the Court's inquiry is focused on a reasonable interpretation of the term "restoration of lands," not on the nature of the Secretary's obligation. The Court is not persuaded that the discretionary nature of the Secretary's obligation to take land into trust for the UAIC bears any weight on the Court's consideration of the statute for purposes of determining the proper construction of the phrase "restoration of lands." Congress' intention to grant the Secretary discretion in her decisions to take land into trust for the UAIC in no way undermines the clear Congressional intent to reestablish a land base for the Tribe.

The United States also urges the Court to give deference to the Secretary's decision to take the parcel into trust. The Secretary's decision is based on her review of the Tribe's Application, supporting documentation and public comments on the trust application. As such, the decision may well be due deference under *Chevron*. However, the parties have asked the Court to consider plaintiffs' IGRA claim on a motion to dismiss for failure to state a claim. Plaintiffs' claim that the Secretary's decision violates IGRA rests solely on their contention that the Secretary was obligated to comply with the requirements of Section 20(b)(1)(A).[10] The Court

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[10] Plaintiffs' complaint may be read to include a claim that the Secretary's decision was arbitrary and capricious, irrespective of whether the parcel in question is properly characterized as the "restoration of lands."

finds that, as a matter of law, a decision by the Secretary to take land into trust for the UAIC that lies within Placer County is subject to the exception set forth in Section 20(b)(1)(B)(iii). This finding does not rest on the vast administrative record underlying the Secretary's decision, and the Court need not determine what deference is due the Secretary's decision to take this parcel into trust for the UAIC.

The plain meaning of IGRA's exception for "lands . . . taken into trust as part of . . . the restoration of lands for [a restored] Indian tribe" dictates that the Court turn to principles of restitution. In interpreting the scope of this restitution, the Auburn Indian Restoration Act provides persuasive evidence of Congress' intent to restore lands to the Tribe. Congress provided the Secretary with the authority to reestablish a land base for the UAIC by accepting into trust real property located in Placer County, California. Accordingly, the Court holds that the parcel at issue in this case, a 49-acre lot in Placer County, is land taken in trust as part of the restoration of lands for the UAIC. The Court finds that it is likely that the Auburn Indian Restoration Act intended to permit the United States to take in trust, and thus attempt to "restore" to the UAIC, a land base similar to the one that they held previous to their disbandment.

C. NEPA Violation and Abuse of Discretion by the Secretary of the Interior

Plaintiffs argue that the Secretary of the Interior abused her discretion by failing to consider the negative impacts that the operation of the tribe's casino would have on the surrounding area. Specifically, plaintiffs contend that the Secretary acted arbitrarily and capriciously by relying on the FONSI and the

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See Compl. ¶ 53. However, plaintiffs failed to defend this claim in their opposition memorandum or at oral argument, and the Court treats it as conceded.

EA in approving the UAIC's request that the United States take title to the parcel in trust for the Tribe.

Plaintiffs contend that the FONSI was arbitrary, capricious and contrary to law because the defendants failed to comply with their obligations under NEPA, the NEPA regulations of the President's Council on Environmental Quality, 40 C.F.R. Pts. 1500-08, Part 516 of the Department of Interior Departmental Manual, the Bureau of Indian Affairs NEPA Handbook, and other relevant federal environmental policy guidance documents. Plaintiffs' main challenge to the EA performed is that it was prepared by the applicant and its consultants. In addition, plaintiffs challenge the substance of the EA, contending that it failed to examine alternatives, was based on undisclosed data and did not sufficiently consider the impact of a casino on rare and endangered species.

NEPA requires that when a federal agency undertakes a major federal action significantly affecting the quality of the human environment, it must prepare a detailed environmental impact statement ("EIS") concerning that action. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11. An EA is conducted for the purpose of determining whether an EIS is required. *See* 40 C.F.R. § 1508.9. "If any 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared before agency action is taken." *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983). An agency decision that an EIS is not required may be overturned "only if it was arbitrary, capricious or an abuse of discretion." *Sierra Club v. United States Dep't of Transportation*, 753 F.2d 120, 126 (D.C. Cir.1985).

The D.C. Circuit recently described the appropriate standard of review of an agency finding of no significant impact ("FONSI"):

> Under the long-established standard in this circuit, the court reviews an agency's finding of no significant

> impact to determine whether: First, the agency [has] accurately identified the relevant environmental concern. Second, once the agency has identified the problem it must have taken a "hard look" at the problem in preparing the EA. Third, if a finding of no significant impact is made, the agency must be able to make a convincing case for its finding. Last, if the agency does find an impact of true significance, preparation of an EIS can be avoided only if the agency finds that the changes or safeguards in the project sufficiently reduce the impact to a minimum.

Grand Canyon Trust v. FAA, 290 F.3d 339, 340-41 (D.C. Cir. 2002) (internal citations omitted).

1. Standing

"To be adversely affected within NEPA, [plaintiffs] must at least demonstrate that they can satisfy all constitutional standing requirements and that their particularized injury is to interests of the sort protected by NEPA." *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996) (en banc). The Court reviews plaintiffs' NEPA claim pursuant to Fed. R. Civ. P. 56, insofar as all parties rely on the administrative record to support their arguments with respect to this claim. Upon review of a motion for summary judgment, plaintiffs must assert more than mere allegations to establish standing. Rather, they must demonstrate that they have "raised a genuine issue of fact as to whether an 'agency action' taken . . . caused [plaintiffs] to be 'adversely affected or aggrieved . . . within the meaning of a relevant statute.'" *Lujan v. National Wildlife Federation*, 497 U.S. 871, 885, 110 S. Ct. 3177 (1990).

The D.C. Circuit has recently made clear that, while "geographical proximity does not, in and of itself, confer standing on [a city] under NEPA," such proximity may allow a city to establish NEPA standing by "alleg[ing] harm to its

own economic interests based on the environmental impacts of [an] approved project." *City of Olmsted Falls v. FAA*, 292 F.3d 261, 267-68 (D.C. Cir. 2002). The plaintiff cities here have cited to evidence in the record that suggests that the proposed gaming facility will constitute a drain on the local economy. A.R. 8443. Further, plaintiffs cite traffic analyses in the record that predict an increase in harmful emissions from the increased vehicle traffic likely to be caused by the casino. A.R. 7861. This record evidence is sufficient to raise a genuine issue of fact as to whether the cities' economic interests will be affected by the predicted environmental impact of the project.

The plaintiff organization, Citizens for Safer Communities, also has standing to bring the NEPA claim. Plaintiffs have demonstrated that genuine issues of fact exist as to whether the members are likely to experience predicted environmental effects of the project such as increased noise and pollution due to their close proximity with the project. A.R. 4415, n.1. The organization itself has standing because the participation of its individual members is not necessary to the maintenance of this lawsuit, and the interests asserted are germane to the organization's purpose. *Id.*; *see Hunt*, 432 U.S. at 343.

2. Plaintiffs' Procedural Challenges to the Adequacy of the EA

Pursuant to the regulations of the Council on Environmental Quality, 40 C.F.R. § 1506.5(b), an agency may permit an applicant to prepare an EA. However, federal agencies must perform independent reviews of such an EA and must participate actively and significantly in the preparation process. In full, the regulations provide:

> (a) Information. If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency

> shall independently evaluate the information submitted and shall be responsible for its accuracy. . . . It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.
>
> (b) Environmental assessments. If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take 89 responsibility for the scope and content of the environmental assessment.

40 C.F.R. § 1506.5(a), (b). The regulations further provide that, where an EIS, as opposed to an EA, is prepared, it must "be prepared directly by or by a contractor selected by the lead agency." 40 C.F.R. § 1506.5(c). Plaintiffs appear to argue that this requirement applies to the instant case. However, defendants need only comply with subsections (a) and (b), as the UAIC was asked to prepare only an EA, and not an EIS.

The Court finds no grounds to conclude that defendants did not take responsibility for the scope of the EA, or that they did not make an independent evaluation of the environmental impacts of the proposed projects. The declaration of Mr. Zweig describes in detail his work with BIA employees on the EA. *See generally* Zweig decl. In addition, the administrative record contains extensive copies of e-mail communications between the agency staff discussing their comments on, and edits of, the EA. *See*, *e.g.*, A.R. at 200359-61, 200373-75; *see also* A.R. 4272. The only evidence, to which plaintiffs direct the Court's attention, is an affidavit by plaintiffs' attorney that was included in the administrative record. A.R. 4998. In the affidavit, the attorney asserts that BIA does not possess some of the source materials, which are included in the record. However, in its responses to comments on the draft EA, the BIA explained:

> [W]e participated in several site reviews, numerous meetings with the tribe and other parties; EPA, Fish and Wildlife Service, Placer County, the Cities of Lincoln, Roseville and Rocklin among others. We did independently review four administrative versions of the document, providing comments and writing some portions of the document. We did not maintain copies of earlier administrative drafts for the following reasons: maximizing limited storage space when dealing with about twenty-five different projects, avoiding confusion concerning the most current version of the document, and avoiding having our deliberative process second guessed by outside parties using the FOIA process.

A.R. 00615. Plaintiffs fail to point to any evidence in the administrative record that would persuade this Court that the BIA's explanation is unreasonable, or that the agency failed to independently review the submissions of the UAIC and their consultants.

Plaintiffs also contend that the BIA accepted without question the technical content of the EA submitted by the Tribe and its consultants. In particular, they point to the EA's traffic analysis that was based on trip general rates based on data from four other "confidential" casino locations. Plaintiffs argue that the BIA and Department of Interior cannot reasonably accept as accurate the unsubstantiated assumptions and conclusion of the EA that are based on "confidential" data. However, Mr. Zwieg's declaration states that, while the data was initially kept confidential in order to protect proprietary interests of the four casinos, the data was released to the public in response to comments on the EA. *See* Zweig decl. ¶ 9. That the names of the casinos involved in the traffic analysis were initially kept confidential simply does not impugn the overall quality of the EA. Plaintiffs fail to raise a genuine issue of fact with respect to the BIA's compliance with the Council on Environmental Quality's regulations.

Plaintiffs also argue that the Department of Interior's NEPA manual prohibits applicants from preparing EAs. However, in support of this proposition, plaintiffs cite to a provision that applies when a tribal government is not an "applicant," but is merely "affected" by a proposed action, in which case the Tribe "shall be consulted during the preparation of environmental documents." A.R. 4780, *cited in* Opp'n at 54-55. In contrast, the manual provides that, "[w]hen the proposed Bureau action is a response to an externally initiated proposal, . . . the applicant will normally be required to prepare the EA, if one is required, and to provide supporting information and analyses as appropriate." A.R. 5935. Accordingly, plaintiffs have failed to demonstrate any factual dispute that might suggest that the EA was procedurally defective.

3. Substantive Challenges to Adequacy of the EA

Plaintiffs make four substantive challenges to the sufficiency of the EA, arguing that it relied on undisclosed data, failed to consider alternatives, does not provide adequate surface water plans, and did not consider the impact of the proposed casino on rare and endangered species. However, plaintiffs are unable to identify any disputed facts that might suggest that the BIA has not "accurately identified the relevant environmental concern" with respect to the issues raised by plaintiffs, or that the agency has not "taken a 'hard look'" at the issues. *Grand Canyon Trust*, 290 F.3d at 341. Furthermore, the Court finds that the BIA has made a convincing case for its finding of no significant impact.

a. Water Supply

Plaintiffs contend that the BIA failed to take a "hard look" at the water supply in the area of the proposed project. Plaintiffs argue that the EA analyzes only two options for providing a water source for the site: hooking into the Placer County Water Agency, or using groundwater located on the

site. In fact, the EA considers *three* options, the third of which is to import water purchased from a public agency or private company, which could be stored in a water tank on the site. *See* A.R. 00338.

No serious issue is raised with respect to the EA's consideration of two of these options. Plaintiffs wholly fail to address the environmental impact of importing water and simply suggest that many "factors" would play into hooking up to Placer County's water supply. Plaintiffs' main argument focuses on the option of drilling an on-site well.

The EA found that the construction of an on-site well would have no significant impact. However, plaintiffs argue that the EA fails to assess the possible impact of constructing such a well on the underlying aquifer and on surrounding wells. Appendix E of the EA is a report describing the availability of groundwater for the project. It does not purport to consider the effects of a well on neighboring wells, which may or may not draw water from the same aquifer. Plaintiffs contend that the appendix fails to consider the possibility of an "overdraft," citing a January 1999 report indicating that Placer County is currently under a "state of overdraft" regarding groundwater consumption. *See* A.R. 07910.

The United States, however, points to a MOU between the Tribe and Placer County that would permit the Tribe to utilize groundwater wells under certain circumstances, thus refuting any concern that the UAIC's use of groundwater would be viewed as unacceptable by the County.[11] In addition, the EA concludes that the construction of a well, which would

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[11] Specifically, the MOU provides: "The Tribe shall use its best efforts to obtain surface water supply for Parcel B through an agreement with either the Placer County Water Agency ("PCWA"), the City of Lincoln or another water district and shall conform to all standard requirements imposed by the water provider. If approval cannot be obtained, the Tribe shall provide water for Parcel B with wells." A.R. 00828.

require a "continuous 60 gallon per minute draw on the groundwater basin," "would not represent a substantial new demand on the groundwater basin." A.R. at 397. In the response to public comments regarding possible overdraft, the EA notes that several wells in the vicinity of the site are drawing water at 200 to 1,000 gallons per minute. A.R. 04570. The facility's projected water demand would amount to approximately 0.02% of the current groundwater extraction in the region. *Id.* at 04570-71. Thus, the Court cannot conclude that the EA's determination that an on-site well would not have a significant impact on the water supply is inadequately supported by the EA and accompanying materials.

An agency's decision to rely on some information, and not other, is not a violation of NEPA insofar as that reliance is reasonable. *See Sierra Club v. Watkins*, 808 F. Supp. 852, 862 (D.D.C. 1991). Here, the agency clearly considered the information cited to by plaintiffs regarding a potential overdraft, and considered the impact of an on-site well on the aquifer. This Court's review is limited to evaluating whether the agency's action was reasonable. The Court finds that the BIA's conclusions with respect to water supply options are substantiated by a reasoned record.

b. Wastewater

Plaintiffs also contend that the EA's consideration of alternatives for wastewater disposal are deficient. They note that the EA considered four alternatives, one of which involves a MOU with the City of Lincoln that was recently voided by the Placer County Superior Court pending compliance with state environmental law. A.R. 0200058. Plaintiffs then argue that the other "two options," construction of an on-site wastewater treatment plant and offsite hauling, would require an EIS. They fail to discuss the existence of the fourth alternative, connecting to Placer County's sewage facilities.

Plaintiffs' argument regarding the possibility of constructing an on-site treatment plant and off-site hauling is simply that these possibilities are "obviously actions that will result in a 'significant' impact on the human environment." Opp'n at 58. Plaintiffs offer absolutely no support for these statements, except to also add that the BIA "ignored flood control issues" that might result from increased discharge into Orchard Creek. Again, this statement is made without any supporting citation to the record.

Indeed, the United States notes that the EA considered the issue of flooding, and found that the proposed treatment plant would add 0.1 cubic feet per second of flow to the creek, and that such an increase would have an insignificant effect on the creek's carrying capacity. A.R. 00396. To the extent that this matter is proceeding on summary judgment grounds, plaintiffs have failed to demonstrate that there is a genuine dispute as to the potential impact of an on-site treatment plant.

Plaintiffs also suggest that the project would "violate policies adopted to protect water quality." Opp'n at 59 (citing to Placer County General Plan, A.R. 6613-14; Sunset Industrial Area Plan, A.R. 06790, 06794-95). However, plaintiffs fail to explain why the project would violate local policies.

Plaintiffs contend that the effect of mercury that may be contained in wastewater effluent was not discussed in the EA. However, a review of the EA shows that the EA did consider the effects of mercury, and that Orchard Creek was sampled for mercury. A.R. 00536, 537 (mercury testing results). The level of mercury in Orchard Creek was found to be "below thresholds identified under current water quality plans." *Id.* Plaintiffs further note that the Delta, where effluent from a wastewater treatment plant would flow, is already listed as an impaired body of water under Section 303(d) of the Clean Water Act, due to "elevated mercury concentrations" found in fish. Opp'n at 58 (citing A.R. 09355-57, Mem. from C.

Bunker, City of Lincoln, to J. Pedri, City of Lincoln). Ultimately, plaintiffs do not present evidence to genuinely dispute the EA's finding that the levels of mercury in any wastewater effluent would not have a significant impact are erroneous.

Finally, plaintiffs note that the California Department of Toxic Substances Control passed rules on levels of toxicity exempting Indian Territory from its provisions. Thus, plaintiffs are concerned that a wastewater treatment facility on the site would be exempt from monitoring by the Regional Water Quality Control Board. Opp'n at 58. The EA contains a letter from the California Regional Water Quality Control Board, in which the Board notes that, indeed, pursuant to Regional Board Resolution No. 82-036, waste discharge requirements would be waived for the project. *Id.* Nevertheless, having considered the project, the Board issued a finding that "[n]o significant threat to water quality should result from this activity." A.R. 00518. Plaintiffs have failed to identify any disputed facts that might suggest that the BIA's consideration of wastewater disposal options was unreasonable.

c. Impact on Endangered and Threatened Species

Plaintiffs claim that the EA "fails to even consider whether the proposed project would significantly impact the endangered and threatened species 'likely to occur in the project site area,'" and maintains that the EA does not list endangered and threatened species actually occurring on the site. Opp'n at 59- 60, 60 n.5. This is simply incorrect. The EA contains a comprehensive, five-page list of "special-status species," which were considered in the evaluation of the project site. *See* A.R. 00364-68. The listing identifies endangered and threatened species, and describes the degree to which each species occurs in the project area. *Id.*

Plaintiffs contend that the EA does not discuss whether the proposed wastewater treatment plant and discharge would affect vernal pool fair shrimp, vernal pool tadpole shrimp, or Boggs Lake hedge-hyssop. Yet, the EA includes at least two appendixes that specifically address the predicted impact of wastewater effluent on aquatic habitats and means of mitigating any adverse impact. *See* Appendixes D, F.

The appendixes demonstrate that the EA authors devoted significant efforts to predicting the impact of the project on endangered and threatened species and on mitigating any such impact. The EA contains correspondence from the "Wetland Consultants," a private firm that recommended that, because the project involves filling potential fair shrimp habitat, consultation with the U.S. Fish and Wildlife Service was required pursuant to Section 7. A.R. 00500-03. The federal defendants consulted with the Fish and Wildlife Service to Section 7 on the potential impacts to threatened and endangered species, and adopted mitigation measures recommended by the Service as a condition to its FONSI. *See* A.R. 00402, 493-520. The Fish and Wildlife Service issued a biological opinion regarding the project, which it then amended to reflect changes in the project, including the creation of a buffer zone along the western boundary of the project. This buffer zone serves to separate the project area from the Orchard Creek Conservation Bank and from vernal pools and swales. A.R. 00511. With the buffer zones, the Service concluded that "the overall impact of the proposed project is relatively small (1.63 acres of vernal pools/ swales)." *Id.* at 00512.

Plaintiffs also raise the issue of whether mitigation measures proposed by UAIC are consistent with the Placer Legacy program to preserve open space, or whether design of the project will permit full compliance with Placer County General Plan and the Sunset Industrial Area Plan policies intended to protect wetlands, riparian areas and streams.

However, they present no support for their "suggestion" that the mitigation measures are either insufficient or inappropriate. Again, plaintiffs have raised no genuinely disputed issue with respect to the reasoning or thoroughness of the BIA's consideration of the potential effect of the gaming facility on endangered and threatened species.

d. Failure to Consider Alternatives

The Court will uphold an agency's "discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991). Plaintiffs argue that the scope of alternatives to be considered in an EA is broader than the requirement for consideration of alternatives in an EIS. Plaintiffs' two primary challenges to the EA's consideration of alternatives are that the analysis is only six pages, and did not consider two additional alternatives, the "Yuba County" and the "Nyack North" alternatives. However, in addition to the alternatives evaluated in detail in the EA, the EA also considers and rejects for a variety of reasons several other sites. *See* A.R. 00313-14, 00574 (BIA memo discussing alternative site); A.R. 00614-15 (BIA recommendation memo discussing alternative sites); A.R. 00262-63 (BIA memo addressing report outlining alternative site). The fact that the EA may not have considered a specific alternative preferred by plaintiffs is simply not grounds for finding that the agency failed to meet its obligations in preparing the EA, or that the agency's decision was "arbitrary and capricious." *See Citizens Against Burlington*, 938 F.2d at 194.

In short, plaintiffs' substantive and procedural challenges to the EA fall short of the mark. Indeed, it would appear that plaintiffs bring their NEPA claim *despite* the clear import of the NEPA regulations and the contents of the EA prepared in this case. Accordingly, the Court enters summary judgment for defendants and intervenor on plaintiffs' NEPA claim.

D. Order to Show Cause

The Court is deeply concerned that plaintiffs appear to concede that, in drafting their complaint, they included causes of action as a means of "indicating" more general concepts of constitutional protections of state sovereignty. Plaintiffs' complaint includes separate causes of action for violation of the Statehood Clause, the Enclaves Clause, the Equal Footing Doctrine, and the Tenth and Ninth Amendments. Consequently, the defendants and intervenor, as well as the Court, were obligated to approach each cause of action as a separate alleged violation. Yet, the Court was informed at oral argument that all of these counts were included to illustrate a general, constitutional requirement that federal action implicating state sovereignty be taken only with the consent of the states. Putting aside any question regarding the merits of plaintiffs' position, the complaint is wholly at odds with plaintiffs' representations at oral argument. Plaintiffs' complaint does not assert a cause of action arising from the violation of a constitutional principle of state sovereignty reflected in various constitutional provisions. Rather, plaintiffs chose to set forth individual allegations of constitutional violations that, it would appear, plaintiffs did not seriously believe had a basis in law. *See* Tr. at 49. The Court is not comforted by plaintiffs' explanation that these allegations were meant as "indications" of constitutional concerns. *Id.*

Further, plaintiffs' counsel conceded that their ninth cause of action, which alleges that the State-Tribal Compact violates the Fourteenth Amendment, was included simply as a security measure. Tr. at 5. Plaintiffs apparently conceded this claim by failing to defend it in their opposition brief, albeit without explicitly notifying the parties or the Court of this concession.

Plaintiffs' litigation strategy is, at best, troubling. When an attorney files a complaint in federal court, she certifies to the

Court that the legal arguments contained therein, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11. Yet, here, plaintiffs apparently admit that they intentionally included causes of action in their complaint that they did not believe had a good faith basis in law, but which plaintiffs believed would give rise to judicial consideration of general constitutional concerns. The Court is loathe to condone this fast and loose approach to drafting a complaint. Accordingly, the Court will order plaintiffs to show cause why they should not be sanctioned pursuant to Fed. R. Civ. P. 11 for advancing legal causes of action, which they apparently did not believe were warranted by existing law, and did not intend to defend by arguing for an extension of the law or the establishment of new law.

CONCLUSION

The Court has carefully considered the parties' motions, the responses and replies thereto, the entire record herein, the oral argument of counsel and the applicable statutory and case law. For the foregoing reasons, the Court enters judgment for defendants and intervenor on plaintiffs' claim that the Secretary has violated NEPA (second cause of action). The Court grants defendants' and intervenor's motions to dismiss plaintiffs' remaining claims with prejudice. The Court holds that plaintiffs do not have standing to assert their claims under the Enclaves Clause, Statehood Clause, Tenth Amendment and Equal Footing Doctrine and, lest doubts persist, that plaintiffs have failed to state claims upon which relief may be granted pursuant to these constitutional provisions. Plaintiffs have sufficiently alleged standing to proceed with their claims that the Secretary has violated Section 20 of IGRA and that the Indian Auburn Restoration

Act constitutes an unconstitutional delegation of Congressional authority. However, these claims must be dismissed because they fail to state claims upon which relief may be granted.

An appropriate Order and Judgment was entered on the docket on September 9, 2002.

/s/ Emmet G. Sullivan
Emmet G. Sullivan
United States District Judge
September 11, 2002

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. Action No. 02-0628 (EGS)

CITY OF ROSEVILLE, *et al.*,
Plaintiffs,

v.

GALE A. NORTON, *et al.*,
Defendants.

ORDER AND JUDGMENT

Pursuant to Federal Rule of Civil Procedure 65(a)(2), and without objection from any party, the Court consolidated plaintiffs' motion for preliminary injunctive relief with proceedings on the merits. For the reasons stated in open court on September 9, 2002, and upon careful consideration of the defendants' and intervenor's motions to dismiss or, in the alternative, for summary judgment, and the plaintiffs' motion for summary judgment, the responses and replies thereto, supplemental briefing by the parties, oral argument by the parties, the entire record herein, and the applicable statutory and case law, it is hereby

ORDERED that defendants' and intervenor's motion to dismiss is GRANTED in part with respect to plaintiffs' first, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action; and it is

FURTHER ORDERED that defendants' and intervenor's motion for summary judgment is GRANTED in part with respect to plaintiffs' second cause of action; and it is

FURTHER ORDERED that plaintiffs' claims set forth in their first, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action are DISMISSED with prejudice; and it is

FURTHER ORDERED that plaintiffs' motion for summary judgment in DENIED; and it is

FURTHER ORDERED and ADJUDGED that the Clerk shall enter final judgment for defendants and intervenor, and against the plaintiffs, on plaintiffs' second cause of action; and it is

FURTHER ORDERED that plaintiff's tenth cause of action, which seeks preliminary injunctive relief, is DENIED as moot; and it is

FURTHER ORDERED that the Court *sua sponte* stays this Order and Judgment until September 11, 2002 at 12:00 p.m.

A Memorandum Opinion will follow.

IT IS SO ORDERED.

DATE: September 9, 2002

Signed by: EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE